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United States 1329

Circuit Court of Appeals**For the Ninth Circuit.**

In the Matter of J. H. McNEICE and FRED McNEICE,
Individually and as Copartners, Doing Business
Under the Name and Style of McNEICE FURNI-
TURE CO., Bankrupts.

DOLPH BARNETT, as Trustee of J. H. McNEICE and
FRED McNEICE, Individually and as Copartners,
Doing Business as McNEICE FURNITURE COM-
PANY, Bankrupts,

Appellant,

vs.

O. A. SPROAL,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Eastern District of Washington,
Southern Division.

FILED

NOV 21 1922

F. D. MONKTON,
CLERK

United States
Circuit Court of Appeals

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In the United States District Court for the Eastern
District of Washington, Southern Division.

No. 891.

In the Matter of J. H. McNEICE and FRED
McNEICE, Individually and as Copartners,
Doing Business Under the Name and Style of
McNEICE FURNITURE CO.,

Bankrupts.

Stipulation as to Record on Appeal.

IT IS HEREBY STIPULATED AND
AGREED by and between counsel herein that the
record on appeal shall constitute the following
papers and none other, and the clerk, in preparing
the record shall omit all captions, endorsements,
acceptances of service and verifications, except file-
marks:

1. Claim of O. A. Sproal.
2. Objections of Trustee to claim of O. A. Sproal.
3. Order of Referee.
4. Petition of review by Trustee.
5. Certificate of Referee.
6. Order of Judge Rudkin.
7. Opinion of Judge Rudkin.
8. Abstract of testimony as per copy attached.
9. Petition and order allowing appeal.
10. Assignments of error.
11. Citation.

Dated this 9th day of September 1922.

NELSON R. ANDERSON,
ROBERTS & ROBERTS,

Attorneys for Trustee.

GRADY, SHUMATE & VELIKANGI,

Attorneys for Claimant. [1*]

Claim of O. A. Sproal.

On December 30, 1919, the said bankrupts entered into a written lease with O. A. Sproal whereby they rented from him two storerooms located at 117 and 119 East A. Street and one storeroom located at 102 North 2d Street, the same being a part of the building owned by said Sproal; that the agreed rental was \$375.00 per month; that no rental has been paid for the months of June, July, August and September. The bankrupts occupied said building until some time in July, the exact date being unknown to deponent. When they made an assignment for the benefit of creditors and the assignee has since occupied said rooms, and still occupies them under the terms of the lease.

June rental\$ 375.00

July rental 375.00

August rental 375.00

September rental 375.00

TOTAL\$1500.00

[2]

COMBINATION PROOF.

[For Debt Due Corporation, Partnership, Individual—Secured or Unsecured]

In the District Court of the United States for the Eastern District of Washington.

IN BANKRUPTCY—No. —

In the Matter of MCNEICE FURNITURE COMPANY BANKRUPTCY, Bankrupt.

At Yakima, in the Eastern District of Washington, on the 10th day of September, A. D. 1921, came C. E. Fraser, of —, in the said District of —, and made oath and says that: (1)

(a) He is Treasurer (5) of the —, a corporation, incorporated by and under the laws of the State of —, and carrying on business at —, in the County of — and State of —, and that he is duly authorized to make this proof and says that the said — the person (firm or corporation) by (or against) whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is justly indebted to said corporation,

(b) He is one of the firm of —, consisting of himself and —, of —, in the County of — and state of —; that the said — the person (firm or corporation) by (or against) whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is justly indebted to this deponent's said firm,

(c) J. H. McNeice and Fred McNeice, copartners doing business as McNeice Furniture Company, the (firm) (against) whom a petition for the adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and true indebted to O. A. Sproal, for whom deponent, is agent.

In the sum of (2) Fifteen Hundred (\$1500.00) Dollars; that the consideration of the said debt is as follows: (3) Rental for June, July, August, and September 1921, at \$375.00 per month according to terms of written lease which is unexpired, more particularly set forth in the itemized account hereto annexed and made a part of this proof; that no part of said debt has been paid, except as shown by said account; that there are no setoffs or counter-claims to same except as shown by said account;

(4) That the said O. A. Sproal has not, nor has any person by his order, or to the knowledge and belief of said deponent for his use, had or received any manner of security (4) whatever, or any note (s) for such account; nor has any judgment been rendered thereon. (3)

And that the only securities held by said — for said debt are the following (listing and describing securities):

C. E. FRASER. (5)

Subscribed and sworn to before me this 10 day of September, 1921.

THOS. E. GRADY, (6)
Notary Public.

1. If creditor is corporation use paragraph "a"; if partnership use "b"; if individual use "c," striking out paragraphs not applicable.

2. Interest should be computed to date of filing petition if claim earns interest. If debt falls due at a later date and does not earn interest, then interest should be rebated to date of filing petition. See B. A. Sec. 63 (a) (b). If account consists of items maturing at different dates, the average due date should be stated, in default of which it shall not be necessary for Referee to compute interest. If open account it should state when debt became due. Each item should be dated and described. See Gen. Ord. 21.

3. If claim is founded on note or other instrument the same should be filed with proof of claim. If instrument be lost or destroyed statement of the fact should be filed under oath with claim. See B. A. Sec. 57 (b). If this form is used to prove a note, the words "or any note for such account" should be erased. If judgment has been rendered, it should be aptly described. The better plan is to file a certified transcript of judgment. If this form is used to prove judgment, the words "nor has any judgment been rendered thereon" should be stricken out.

4. If a debt is a secured claim, this paragraph should be stricken out, and the securities listed under the next paragraph. If claim is unsecured the next paragraph should be stricken out.

5. If claim is for debt due corporation, this proof must be made by Treasurer; if corporation has no Treasurer, by officer whose duties most nearly correspond to Treasurer. If debt is due partnership the signature here should be by party making affidavit, and not by firm name.

6. Signature and official capacity of officer. This may be acknowledged before a Referee, U. S. Commissioner, or Notary Public. [3]

Objections of Trustee to Claim of O. A. Sproal.

Comes now Dolph Barnett, as Trustee of the above-named bankrupts, by his attorneys, Roberts & Roberts and Nelson R. Anderson, and objects to the claim filed herein by O. A. Sproal, and respectfully shows the Court:

I.

That the above-named bankrupts on June 8th, 1921, made an assignment for the benefit of creditors to F. C. Hall; that the deed of assignment executed by said bankrupts dated June 8, 1921, conveyed all the stock and fixtures of the bankrupts located in that certain storeroom, corner of A and N Second Streets, Yakima, Washington, same being the premises for which O. A. Sproal has filed a claim for rent herein; that said F. C. Hall took possession of said stock and fixtures on June 20, 1921, and immediately removed said stock and fixtures out of the front part of said store and into the rear side room of said premises and on or about said 20th day of June, 1921, notified said landlord that the front part of said store and said premises were abandoned by said Assignee and that said landlord might re-enter and take possession of the front part of said storeroom. [4]

II.

That thereafter and on the — day of August, 1921, the undersigned, Dolph Barnett, was duly elected Trustee of the bankrupts herein and im-

mediately qualified and at all times since was and is duly elected, qualified and acting Trustee of the above named bankrupt estate.

III.

That said Trustee immediately took possession of the stock and fixtures of the bankrupts located in the rear of the aforesaid premises and at no time occupied the front part of said storeroom, that the said front part of said storeroom is the corner room of said premises and the most important and most valuable part of said premises, that the Trustee has at no time occupied the front part of said premises, that said landlord at all times has had possession and could have leased or rented the front part of said storeroom, that said landlord has at no time made demand upon said Assignee or said Trustee for the possession of the rear of said premises or at all, that said Trustee has occupied said premises as a storeroom and place of storage only, that the reasonable value of said premises occupied by said Assignee and said Trustee for the purpose of preserving and storing said stock and fixtures does not exceed the sum of \$50.00 per month; that the reasonable value of the rear of said premises occupied by the Trustee does not exceed the sum of \$100.00 per month for any purpose whatsoever.

IV.

That the assignee and Trustee herein occupied the rear of the aforesaid premises from June 20, 1921, until August —, 1921, [5] that the fair

and reasonable rental of said premises occupied by said Assignee and by said Trustee does not exceed the sum of \$50.00 per month as a place of storage and does not exceed the sum of \$100.00 per month for any purpose whatsoever, that the Court should fix and determine the reasonable rental value of said premises occupied by the Assignee and Trustee and should disallow any further compensation upon the claim filed by said landlord and refuse greater compensation to said landlord from the estate herein.

WHEREFORE, Trustee prays that a hearing be had upon claim filed by said O. A. Sproal, and upon the objections and this petition filed by the Trustee herein, that the Court fix and determine the reasonable rental value of said premises as a place of storage only and allow said claim at a rate not to exceed \$50.00 per month, without waiving the petition of the Trustee, that said rent be fixed on a storage basis only and in the event only that said petition be denied. Trustee prays the Court that it allow said landlord the reasonable rental value of said premises for any and all purposes to not exceeding the sum of \$100.00 per month from the date of said assignment to the date that said premises were reoccupied by said landlord and for such other and further relief as to the Court may seem proper.

DOLPH BARNETT,
Trustee. [6]

Order of Referee.

The above-entitled matter coming on regularly for hearing on the 9th day of December, 1921, upon the objections of the Trustee to the claim of O. A. Sproal, Dolph Barnett, Trustee, appearing in person and by his attorneys, Roberts & Roberts, and Nelson R. Anderson and the claimant, O. A. Sproal appearing by Grady, Shumate & Velikanje, his attorneys, and witnesses being sworn and evidence being submitted and the Court having heard argument of counsel and being fully advised in the premises—

IT IS NOW HERE ORDERED that the claim of the said claimant, O. A. Sproal, be allowed at the rate of \$375.00 per month from June 1st, 1921, to August 13th, 1921, the date of the entry of the Order of Adjudication of said bankrupts, amounting to \$907.45, which said amount is a preferred claim against said estate and at the rate of \$300.00 per month from August 13th to October 5th, 1921, amounting to \$518.39, which said amount is a part of the expenses of the Trustee in the administration of said estate; to which said ruling of the Referee the said Trustee duly excepted and his exception allowed.

Dated this 9th day of December, 1921.

R. B. MILROY,
Referee in Bankruptcy. [7]

**Petition for Review of Referee's Order Allowing
Claim of O. A. Sproal.**

To the Judges of the United States District Court
for the Eastern District of Washington:

Comes now Dolph Barnett, as Trustee of the
above-named bankrupts, and respectfully shows
the Court:

I.

That the Trustee herein filed objections to the
claim of O. A. Sproal filed herein, claiming an
indebtedness against both the estate and Trustee for
rent upon certain premises, on the ground that
said claimant was entitled to a reasonable rental
value on said premises, not exceeding \$100 per
month, from the date of the filing of the petitions
herein on June 21, 1921, until Oct. 1, 1921; that
a hearing was had before the Referee who has
made and entered an order allowing a rental of
\$375 to the date of the adjudication herein, namely,
on August 13, 1921, and at the rate of \$300 per
month from Aug. 13, to Oct. 5, 1921; that said
order was entered Dec. 9, 1921, to which the Trustee
duly excepted and his exception was allowed; The
Trustee feels himself aggrieved by said decision
and said order of the Referee, that said order is
erroneous, in this, that said claimant should have
been allowed rent as per lease to date of filing
petitions in bankruptcy and a rate not exceeding
\$100 per month from June 21, 1921, to Oct. 1, 1921;
that a review of said proceedings and said order

should be had before the United States District Judge herein. [8]

WHEREFORE, Trustee prays that said order be reviewed and reversed and that an order be entered sustaining the objections filed by the Trustee to the claim of said claimant Sproal.

NELSON R. ANDERSON,

ROBERTS & ROBERTS,

Attorneys for Trustee.

Filed Dec. 28, 1921. [9]

Certificate of Referee.

To the Honorable F. H. RUDKIN, Judge of said Court:

I, R. B. Milroy, one of the Referees in Bankruptcy of said Court, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to said proceeding:

The Trustee filed written objections to the claim of O. A. Sproal, which claim was for rent of certain premises, occupied by the bankrupts, under a written lease, which premises were occupied also by the assignee of the bankrupts and by the Trustee after his appointment.

At a meeting of the creditors of said bankrupts duly called and held December 9, 1921, a hearing was had upon said objections and testimony taken thereon. The Referee made an order allowing the claimant rent at the rate of \$375 per month from

June 1, 1921, to August 13, 1921, and thereafter at the rate of \$300 per month, until the premises were vacated by the Trustee.

To which order the Trustee duly excepted and exception was allowed.

The Trustee has filed his petition for review and the question of the amount of rent of said premises is certified to the Judge for his opinion thereon.

That the testimony taken and the papers and files before the Referee in the matter of said question are transmitted herewith.

Dated this 3d day of January, 1922.

R. B. MILROY,
Referee in Bankruptcy. [10]

Order Modifying Order and Judgment of Referee.

The above-entitled cause coming on for hearing before the above-entitled court upon the appeal of the trustee in bankruptcy from the order of the Referee fixing the claim of O. A. Sproal for rent to be allowed from June 1st, 1921, to October 5th, 1921, and also fixing the fees for the attorney for the bankrupts, the Trustee appearing in person and by Roberts & Roberts and Nelson R. Anderson, his attorneys; the bankrupts appearing by C. E. Udell, their attorney, and O. A. Sproal. appearing by Grady, Shumate & Velikanje, his attorneys, and from a consideration of the record on appeal and argument of counsel it appearing to the Court that the claimant, O. A. Sproal, is entitled to a pre-

ferred claim for rental accruing under the terms of his lease and contract for a period of sixty (60) days immediately preceding the filing of the Petition in Bankruptcy at the rate prescribed in said lease and is entitled to a claim against the estate for rental at the rate of \$300.00 per month from the filing of the petition in bankruptcy until the premises covered by the lease were vacated by the trustees and that the same should be allowed and paid as a part of the expenses of administration of the bankrupt estate,—

IT IS NOW ORDERED BY THE COURT that the order and judgment of the referee be and the same is hereby modified as follows:

That the claim of the said O. A. Sproal for rent under the terms of his lease and contract be allowed and paid as a preferred claim from June 1st, 1921, to July 1st, 1921, at the [11] rate of \$375.00 per month, amounting to \$628.89, and that said claim be allowed and paid as a part of the expenses of the administration of said bankrupt estate from July 1st, 1921, to October 5th, 1921, at the rate of \$300 per month, amounting to \$750.00.

IT IS FURTHER ORDERED that the sum to be allowed to the attorneys for the bankrupts shall be \$150.00.

The trustee excepts to the foregoing ruling of the Court, and his exception is hereby allowed.

Dated this 8th day of April, 1922.

(Signed) FRANK H. RUDKIN,

Judge.

[Endorsed]: Filed in the United States District Court, Eastern District of Washington. April

10th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

Memorandum.

C. E. UDELL, Attorney for the Bankrupts.

ROBERTS & ROBERTS and NELSON R. ANDERSON, Attorneys for Trustee.

GRADY, SHUMATE & VELIKANJE, Attorneys for O. A. Sproal.

RUDKIN, District Judge.

The involuntary petition was filed in this case on July 21, 1921, the order of adjudication followed on August 13, 1921, and the Trustee was elected or appointed on September 20, 1921. The Referee allowed rental on the premises occupied by the bankrupts under the terms of the written lease at the contract rate of \$375.00 per month from June 1, 1921, to the date of adjudication, amounting to \$907.45, and rental at a reasonable rate fixed at \$300.00 per month as expenses of administration from the date of adjudication until the surrender of the premises to the landlord on the 5th day of October, 1921, amounting to \$518.30. The Trustee objected to the allowance of the claim for rent under the terms of the contract after the date of the filing of the involuntary petition, and objected further to the amount of the allowance made for rental after that date as a part of the expenses of administration. Objection was also made to the allowance of attorney's fees to the bankrupts in the sum of \$200.00, and both orders are now before the Court on petition for review. [13]

Inasmuch as the claim for rent was a preferred one for a limited period under the statutes of the state, it would seem to matter little whether the rent is allowed under the terms of the written lease or on a *quantum meruit* basis, unless there is a substantial difference between the contract rate and the reasonable rental value, and inasmuch as the premises were rented for \$375.00 per month prior to the bankruptcy and for \$350.00 per month as soon as the landlord could gain possession after bankruptcy, there is manifestly but little difference between the contract rate and a reasonable rental. However, in my opinion the right to claim rent under the contract as such terminated upon the filing of the involuntary petition, and the Referee should have computed the rental from June 1, 1921, to July 21, 1921, under the terms of the contract at the rate of \$375.00 per month, and from the latter date until October 5th at the rate of \$300.00 per month. I find little merit in the claim that a part of the premises was surrendered by the Trustee, or in the claim that the amount fixed by the Referee as the reasonable rental value was excessive. I have no doubt that the cost of administration was more than it should have been, but this affords no reason why the owner of the premises should be deprived of his property.

There is little in the record to enable the Court to fix the amount of the attorney's fee to be allowed the bankrupts, but inasmuch as the attorney manifestly claimed as a part of his fee compensation for preparing a claim for exemptions and a peti-

tion for a discharge, the former of which cannot be taken into consideration, and the right to compensation for the latter is at least doubtful, I find that \$150.00 is a fair and just allowance and that no greater amount should be taxed against the estate.

The orders of the Referee will be modified accordingly [14]

Petition for Allowance of Appeal.

Dolph Barnett, as Trustee of J. H. McNeice and Fred McNeice, individually and as copartners, doing business as McNeice Furniture Company, Bankrupts, conceiving himself aggrieved by the judgment and order of the Court signed on the 8th day of April, 1922, and entered herein on the 10th day of April, 1922, in the above-entitled cause, for the reasons set out in his assignments of error filed herein, hereby appeals from said judgment and order to the United States Circuit Court of Appeals for the Ninth Circuit, and prays this Honorable Court to grant him an order allowing an appeal from said judgment and said order to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that a transcript of the record, proceeding and papers upon which decision and judgment was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

NELSON R. ANDERSON,
ROBERTS & ROBERTS.

Attorneys for Dolph Barnett,

Trustee. [15]

Order Granting Appeal.

Dolph Barnett, as Trustee of bankrupts herein, having heretofore filed his petition for appeal and assignments of error, and having given notice to said claimant, O. A. Sproul, and the Court having duly considered the above and foregoing petition and being fully advised in the premises.—

IT IS ORDERED that the appeal prayed for be, and the same hereby is granted, and it is further ordered that a transcript of the record be transmitted by the Clerk of this Court to the Clerk of the Appellate Court.

Done in open Court this 6th day of Sept., 1922.

FRANK H. RUDKIN,

Judge. [16]

Assignments of Error.

Comes now Dolph Barnett, as Trustee of bankrupts herein, and assigns the following errors committed by the Court during the trial and in the rendition of the judgment and order entered in the above-entitled matter on the 8th day of April, 1922, allowing the claim of O. A. Sproul, upon which said Trustee will rely in the Appellate Court.

I.

The Court erred in approving the ruling of the Referee allowing the claim of O. A. Sproul as a preferred claim from June 1, 1921, to July 21, 1921, for the reason that said claim was not a lien or preferred claim from June 1, 1921, to July 21, 1921,

as allowed by the Court, said claim having been filed with the Referee on September 13, 1921, and could be a preferred claim only by virtue of Chapter 165, Session Laws of 1917, State of Washington, limiting in point of time a claim for rent entitled to priority as follows, "Such lien shall not be for more than two months rent due or becoming due, nor for any rent or any installment thereof which has been due for more than two months," [17] and hence said lien was of two months' duration next preceding the filing of said claim, namely, the two months preceding the filing of said claim on September 13, 1921.

II.

The Court erred in not entering an order allowing said claim as follows:

June 1, to July 10, 1921, at \$375.00	
per month, as a general claim	\$507.92
July 10, to July 21, 1921, claim entitled to priority	.....120.97
July 21, to Oct. 1, 1921, expenses of Administration @ \$100.00	
per month	..... 233.33

for the reasons stated in Assignment No. I.

III.

The Court erred in allowing said claim at the rate of \$300.00 per month from July 21, 1921 (adjudication), to October 5, 1921 (surrender of premises), as a reasonable rental on *quantum meruit* as part of the expenses of administration, for the reason that an allowance of \$300.00 per month as a reasonable sum is not sustained by the evidence and is contrary

to the evidence, and in no event should any allowance have been made for October 1st to October 5th, as said claimant had executed a written lease on September 1, 1921, leasing said premises from October 1, 1921, for five years and had collected rent from October 1st to December 31, 1921.

IV.

The Court erred in not finding and in not allowing a charge for rent at a rate not exceeding \$100.00 per month as a reasonable rental on *quantum meruit* from July 21, 1921 (adjudication), to Oct. 1, 1921 (date landlord parted with leasehold), as part of the expenses of administration, [18] for the reason that the reasonable rental value of said premises during said time did not exceed \$100.00 per month as is shown by the evidence.

WHEREFORE said Trustee prays that said decision, judgment and order be reversed, and that said District Judge may be directed to enter a judgment and order allowing said claim as a general claim from June 1st to July 10, 192 ; as a preferred claim from July 10th to July 21, 1921; and the sum of \$100.00 per month from July 21 to October 1, 1921, as an expense of administration.

NELSON R. ANDERSON,
ROBERTS & ROBERTS.

Attorneys for Dolph Barnett,
Trustee. [19]

Citation (Copy).

The President of the United States to O. A. Sproul,
and to Grady, Shumate & Velikanje, His Attorneys, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal filed in the clerk's office for the United States District Court for the Eastern District of Washington, Southern Division, in a cause where Dolph Barnett, as Trustee of McNeice Furniture Company, Bankrupt, is appellant, and you are appellee, then and there to show cause if any there be, why the judgment and decree mentioned in said appeal should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this the 6th day of Sept., 1922.

FRANK H. RUDKIN,
Judge. [20]

Abstract of Testimony.**Testimony of F. C. Hall, for the Trustee.**

F. C. HALL, a witness on behalf of the Trustee.

Direct Examination.

(Mr. ANDERSON.)

I was the assignee under an assignment for the benefit of creditors, executed July 8, 1921.

(Testimony of F. C. Hall.)

Mr. VELIKANJE.—Objection on ground of estoppel. They prevented us from voting on the Trustee and after Trustee is elected they turn around and try to oust our claim.

REFEREE.—They admit something due you here but the amount is not determinable. The amount of your preference had not been determined at that time and it was not gone into to determine at that time and I don't know as the Referee passed upon the question whether or not this claim should be voted on or not.

I took possession on July 20, 1921. The assets were all in the rear of the storeroom except some pianos and some rugs that were just over on the front part. I told the agent of the landlord within a day or two after I took possession, that we had no use for the front part of the storeroom. [21]

The rear of the store is 50 foot front by 75 feet deep, with an entrance to the rear of the store from A Street. The front part of the store faces on 2d Avenue and is 25x70 feet deep. The store is in the form of an L. The landlord made no demand on me to vacate the store but asked when I was going to vacate, and I told him that I could not tell just when the goods would be disposed of. I made an inventory of the assets.

Cross-examination.

(Mr. VELIKANJE.)

The front part of the store was already vacant with the exception of three or four pianos that stood in the back part of it and some rugs that hung up

(Testimony of F. C. Hall.)

on the rack. I removed these. To that extent the front part was partly occupied. There were three pianos that were taken out two or three weeks afterwards.

There is no partition between the two rooms. The rear store faces on A Street. The line made by the store facing on A Street is the line dividing the rear from the front room. The front end could not have been leased without a partition.

Redirect Examination.

(Mr. ANDERSON.)

There was room in the rear of the store for all merchandise and I told Mr. Fraser (agent for the landlord) I could take the goods out any time, that I didn't need the use of the front part; the front part facing on 2d Street is the more valuable part of the storeroom. [22]

Testimony of H. W. Bird, for the Trustee.

H. W. BIRD, a witness on behalf of Trustee.

I have lived in Yakima three years and have been engaged in the real estate business and am familiar with the rental value of the business property in the city, such as the storeroom occupied by the bankrupt. The fair market rental value of the premises occupied by the bankrupt during the months of July, August and September, 1921, if not tied up in any form of lease, would be \$100.00 per month.

(Testimony of H. W. Bird.)

The fair market rental value of the rear room under the same circumstances would be about \$50.00 per month.

Cross-examination.

I have not listed any real estate in that neighborhood and base my opinion on knowledge gained through buildings that we have had for sale and rents they have brought on 2d Street. I don't know what rental the Yakima Abstract Company pays now positively any rent paid in the neighborhood. The rental value depends on the value of the real estate, the investment, the demand. I understand the building was leased to Mr. McNeice at \$350.00 a month. I don't know what it is leased for now. The building is not built for storage purposes. I have general information of rental values over the city but I don't know the rent paid on the next door or two from the bankrupt's store. Rentals have gone up since last May, generally speaking.

Testimony of George Du Bourdien, for the Trustee.

GEO. DU BOURDIEN, a witness for Trustee, testified:

I have lived in Yakima for three years and am engaged in the real estate business and I am familiar with rental values on store buildings such as the bankrupt occupied. [23]

I have not done a whole lot of listing but I have done some, including one on 2d Street last month. The fair rental value of this store during July,

(Testimony of George Du Bourdien.)

August and September, 1921, for temporary purposes would be \$100.00 a month.

Cross-examination.

(By Mr. VELIKANJE.)

Q. "Now, if you had an opportunity to lease that at three hundred and fifty dollars a month, what would be the fair rental value in your opinion of that space?"

Objection. No proper basis laid for answer.

A. "I would do the natural thing and take all I could get for it. I would take \$350.00 in preference to \$100.00, of course."

Testimony of Dolph Barnett, in His Own Behalf.

DOLPH BARNETT, Trustee.

I am Trustee in the bankrupt estate, was elected August 13, and immediately took possession of the assets of the bankrupt which were in the back end of the Sproul building. There was some linoleum that slid over the edge into the front part of the store and a phonograph was just down on the partition—they were really not occupying the front.

The landlord, through his agent, told me he would like to have possession as quick as I could give it. I told him I could not give possession of the whole building at that time until I disposed of the goods. He did not demand that I move the stuff out. It was an inquiry of when I would get out; he wanted possession. His attitude was not that he was going to try to force me out. [24]

(Testimony of Dolph Barnett.)

I sold the assets on October 4th to Ira Lewis Brown who retailed the goods out down there during the next two weeks.

A man by the name of Simon moved considerable goods in the front part of the store shortly after I took possession. Mr. Fraser (agent for landlord) requested the keys and permission for Simon to move his goods in.

(Mr. FRASER.—It was about September 10th. I executed the lease with Simons on September 1st.)

Trustee further said that the inquiry as to when possession would be given was about September 1st. I let Mr. Simon move in about September 10th. I did not turn the keys over. Simon occupied the front part of the room from September 10th, on. After October 4th Brown sold out the rear end and Simon operated the front end of the store. The two operated the sale together. Simon had possession.

Cross-examination.

There is a step that goes up to the front room from the rear part of the building and the rugs and linoleum, and I think the phonograph, were just over the edge. The rugs were suspended from the ceiling. The rugs were in the front part of the store. Mr. Simon did not unpack his goods but brought them there in bulk in cases.

Mr. VELIKANJE.—Our answer is uncontroverted.

(Testimony of C. E. Fraser.)

Mr. ANDERSON.—It is not necessary to deny, but if there is any objection we want the record to show that it was denied. [25]

Testimony of C. E. Fraser, for the Claimant.

C. E. FRASER, a witness on behalf of claimant.

I am agent for O. A. Sproul, who owns the building formerly occupied by bankrupt.

Bankrupt made an assignment to Mr. Hall on July 8th. Bankrupt paid the rent to the first of June. I went to Mr. Hall as soon as he was appointed and asked him when we could get possession of the property. He said he could do nothing until the creditors had all gotten together and the goods had been sold. Mr. Hall at no time offered me a key to the building, he did tell me he had no use for the front part of it. I told him I didn't have any use for the front part unless we had all of it because we did not want to put in a partition; we did not want to rent that way, we wanted possession of the whole thing. He said he could not do anything until the court settled the matter and that is the way the whole thing was left and I think Mr. Hall will agree that I spoke to him several times while he was assignee. I had opportunity to lease the building to two or three different parties and wanted to lease the property. I asked \$350.00 a month upon a long term lease. I did not close a lease because I could not get possession or information when I could get possession, the matter was in Court. Adjudication was on August

(Testimony of C. E. Fraser.)

13th and the first meeting of creditors on September 13, 1921.

After Mr. Barnett was elected Trustee I asked him when we could get possession. I had already entered into a lease with Mr. Simon on a five year lease at \$350.00 a month, I expected to get possession the middle of September. [26]

Referring to the Simon lease, the witness said:

“That lease was entered into the first of September and I had planned on getting possession within five days after the trustee had been elected or Assignee had been settled on. The hearing was to be held on the 10th of September and I thought five days would be sufficient to sell the stock, but I made allowance for fifteen days more and dated the lease to commence October 1st to give Mr. Simon opportunity to get in there and fix up the store.”

The stock was sold to Brown, who took possession October 5th. Possession was surrendered to Brown and from him to Simon.

It is not practical to rent the front end of the store without the rear end unless a partition is put in. The property is too valuable to be used for storage purposes.

I spoke to the Trustee several times about getting possession, said he could do nothing until the stock had been sold. I told him and also Mr. Hall we would expect the Assignee or Trustee to stand the rent on the building while we were losing that money right along. I believe I could have rented

(Testimony of C. E. Fraser.)

it because I had three different inquiries besides Mr. Simon, that wished to lease the property but I could give them no information as to when I could give possession.

I have been in the rental business about four years. Rents have increased since June 1st.

Cross-examination.

Q. (Mr. ANDERSON.) Did anybody ever make any offer for the premises before Simon signed up a lease?

A. I could not say as to that they made me a different offer, I quoted the price and they were satisfied with the rental. [27] One firm had to take it up with their outside headquarters and before they finally made a decision I closed a deal with Mr. Simon at the same price I quoted them. There was a strong demand for the property on account of its location.

Simon paid no rent for the front part of the store in September. He had permission from the Trustee to unload the merchandise out of the three carloads shipped from Seattle, he had no place to put it.

“The front part of the store was vacant and he secured possession from the Trustee of the storage of his goods temporarily until he could get possession of the building, which was along in October.”

The lease to Simon is a five year lease at \$350.00 a month, payable monthly in advance, of which Mr. Simon has paid the first and last months' rent. It was executed September 1st, 1921, and commenced

(Testimony of C. E. Fraser.)

to rent from October. Mr. Simon has already paid his rent up to the first of January.

Redirect Examination.

The Continental Pipe Company has a room in the Sproul building next to the alley on A Street and pays \$100.00 a month rent. It is one third of the size of this other room. The Pacific Telephone & Telegraph Company have a room facing on 2d Street which they hold on a long term lease at \$125.00 per month. A grocerteria occupies the corner room on 2d Street next to an undertaking parlors, for which they pay \$100.00 a month on a long term lease. [28]

Filed Sep. 22, 1922.

Citation (Original).

The President of the United States to O. A. Sproul, and to Grady, Shumate & Velikanje, His Attorneys, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal filed in the clerk's office for the United States District Court for the Eastern District of Washington, Southern Division, in a cause where Dolph Barnett, as Trustee of McNeice Furniture Company, Bankrupt, is appellant, and you are appellee, then and there to show cause if any there be, why the judgment and decree mentioned in said appeal

should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this the 6th day of September, 1922.

FRANK H. RUDKIN,

Judge.

Filed Sep. 6, 1922. [29]

[Endorsed]: No. 3936. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of J. H. McNeice and Fred McNeice, Individually and as Copartners Doing Business Under the Name and Style of McNeice Furniture Co., Bankrupts. Dolph Barnett, as Trustee of J. H. McNeice and Fred McNeice, Individually and as Copartners, Doing Business as McNeice Furniture Company, Bankrupts, Appellant, vs. O. A. Sproal, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Filed October 26, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

J. H. McNEICE and FRED McNEICE,
Individually and as Copartners,
Doing business under the name and
style of McNEICE FURNITURE CO.,
Bankrupts.

DOLPH BARNETT, as Trustee of J. H.
McNEICE and FRED McNEICE, Individually
and as Copartners, doing business as
McNEICE FURNITURE COMPANY,
Bankrupts,

Appellant,

vs.

O. A. SPROAL,

Appellee.

BRIEF OF APPELLANT

NELSON R. ANDERSON,

Attorney for Appellant.

1723 L. C. Smith Building
Seattle, Washington

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

J. H. McNEICE and FRED McNEICE,
Individually and as Copartners,
Doing business under the name and
style of McNEICE FURNITURE CO.,
Bankrupts.

DOLPH BARNETT, as Trustee of J. H.
McNEICE and FRED McNEICE, Individually
and as Copartners, doing business as
McNEICE FURNITURE COMPANY,
Bankrupts,

Appellant,

vs.

O. A. SPROAL,

Appellee.

BRIEF OF APPELLANT

NELSON R. ANDERSON,

Attorney for Appellant.

STATEMENT OF THE CASE.

This is an appeal from an Order of the District Court allowing the claim of Appellee for rent as a preferred claim from June 1st. to July 21, 1921 (date of filing involuntary petitions in bankruptcy), the allowance of \$300.00 per month on *quantum meruit* as expenses of administration from July 21st. to Oct. 5, 1921, and from allowing any charge for rent after Appellee's leasing said premises on Oct. 1, 1921.

The undisputed facts are as follows:

July 21, 1921, involuntary petitions in bankruptcy were filed.

August 13, 1921, adjudication was entered.

September 10, 1921, a Trustee was elected.

October 4, 1921, the merchandise and fixtures of the bankrupt estate were sold and possession was given the purchaser and the premises of the landlord were vacated by the Trustee. (R. 14).

September 10, 1921, Appellee landlord filed with the Referee a general unsecured proof of claim

upon a printed form prescribed by the United States Supreme Court for general unsecured claims, with a statement attached reading as follows:

“On December 30, 1919, the said bankrupts entered into a written lease with O. A. Sproal whereby they rented from him two storerooms located at 117 and 119 East A. Street and one storeroom located at 102 North 2nd. Street, the same being a part of the building owned by said Sproal; that the agreed rental was \$375.00 per month; that no rental has been paid for the months of June, July, August and September. The Bankrupts occupied said building until sometime in July, the exact date being unknown to deponent. When they made an assignment for the benefit of creditors and the assignee has since occupied said rooms, and still occupies

them under the terms of the lease.

June Rental.....	\$ 375.00
July Rental.....	375.00
August Rental.....	375.00
September Rental.....	375.00

\$1500.00

(R. 2-4).

This claim was objected to by the Trustee, who set up that on and after the filing of the petitions in bankruptcy that the merchandise and fixtures had been moved out of the front part of said store facing on Second Avenue and into the rear room facing on A. Street; that a reasonable rental value

of said premises was not to exceed \$100.00 per month. (R. 6-8).

A hearing was had before the Referee who entered an order allowing said claim as a *preferred* claim at the rate of \$375.00 per month from June 1, 1921, to August 13, 1921, (the date of the adjudication) amounting to \$907.45, and at the rate of \$300.00 per month upon *quantum meruit* from August 13, to October 5, 1921, amounting to \$518.39, as part of the expenses of administration. This order was entered December 9, 1921, and was duly excepted to by the Trustee. (R. 9).

A petition for review was promptly filed by the Trustee, and allowed by the Referee. (R. 10-11).

Upon the review Judge Rudkin modified the Order of the Referee to the extent of allowing as a preferred claim the rent from June 1, 1921, to July 21, 1921, (date of filing petitions, instead of date of adjudication as Ordered by Referee) under the terms of the contract at the rate of \$375.00 per month, and from the latter date until October 5, 1921, at the rate of \$300.00 per month. (R. 14-15). An order was entered accordingly. (R. 12-13). From said Order this Appellant has appealed.

ASSIGNMENTS OF ERROR.

I.

The Court erred in approving the ruling of the Referee allowing the claim of O. A. Sproal as a preferred claim from June 1, 1921, to July 21, 1921, for the reason that said claim was not a lien or preferred claim from June 1, 1921, to July 21, 1921, as allowed by the Court, said claim having been filed with the Referee on September 13, 1921, and could be a preferred claim only by virtue of Chapter 165, Session Laws of 1917, State of Washington, limiting in point of time a claim for rent entitled to priority as follows: "Such lien shall not be for more than two months rent due or becoming due, nor for any rent or any installment thereof which has been due for more than two months," [17] and hence said lien was of two months' duration next preceding the filing of said claim, namely, the two months preceding the filing of said claim on September 13, 1921.

II.

The Court erred in not entering an order allowing said claim as follows:

June 1, to July 10, 1921, at \$375.00 per month, as a general claim	\$507.92
July 10, to July 21, 1921, claim en- titled to priority.....	120.97
July 21, to Oct. 1, 1921, expenses of Administration @ \$100.00 per month.....	233.33

for the reasons stated in Assignment No. I.

III.

The Court erred in allowing said claim at the rate of \$300.00 per month from July 21, 1921 (adjudication) to October 5, 1921 (surrender of premises) as a reasonable rental on *quantum meruit* as part of the expenses of administration, for the reason that an allowance of \$300.00 per month as a reasonable sum is not sustained by the evidence and is contrary to the evidence, and in no event should any allowance have been made for October 1st to October 5th, as said claimant had executed a written lease on September 1, 1921, leasing said premises from October 1, 1921, for five years and had collected rent from October 1st to December 31, 1921.

IV.

The Court erred in not finding and in not allowing a charge for rent at a rate not exceeding \$100.00

per month as a reasonable rental on *quantum meruit* from July 21, 1921 (~~adjudication~~), to Oct. 1, 1921 (date landlord parted with leasehold), as part of the expenses of administration, [18] for the reason that the reasonable rental value of said premises during said time did not exceed \$100.00 per month as is shown by the evidence. (R. 17-19).

ARGUMENT.

I.

The Trustee contends that the Court was in error in allowing the claim of the Appellee landlord as a preferred claim from June 1, 1921, to July 21, 1921, (date of filing petitions in bankruptcy).

The claim of the landlord was filed as a *general, unsecured* claim upon a printed form prescribed for general unsecured claims, with a typewritten statement attached quoted in the first part of this brief, claiming rent for June, July, August and September, under the terms of the lease at \$375.00 per month. It was executed and filed September 10, 1921. (R. 2-5).

At common law landlords were not entitled to a lien for rent.

Henderson vs. Mayer, 225 U. S. 631, 56 L. ed. 1233, 32S. Ct. 699.

24 Cyc. 1244.

Collier on Bankruptcy, pg. 1054.

The Appellee landlord might have filed a claim as a preferred claim and asked that it be held a lien on the assets of the bankrupt for a period of two months, provided said rent or installment thereof had not been due for more than two months under Chapter 165 of the Session Laws of 1917, State of Washington, (Sec. 1203 Rem. Comp. St., Wash.) reading as follows:

“LIEN FOR RENT—PROPERTY SUBJECT—EXTENT OF LIEN. Any person to whom rent may be due, his executors, administrators or assigns shall have a lien for such rent which is paramount to, and has preference over, all other liens except liens for taxes, general and special liens of labor and mortgages or conditional bills of sale duly recorded prior to tenancy upon personal property of the tenant which has been used or kept on the rented premises, except property of third persons delivered to or left with the tenant for storage, repair, manufacture or sale, and such property exempt from execution by the laws of the state of Washington. Such liens shall not be for

more than two months' rent due or to become due, nor for any rent or installment thereof which has been due for more than two months; that no writing or recording shall be necessary to create such lien; and if such property be removed from the rented premises and not returned to the owner, agent, executor, administrator, or assign said lien shall continue and be a superior lien on the property so removed for ten days from the date of its removal, and said lien may be enforced against the property wherever found. In the event the property contained in the rented premises be destroyed by fire or other elements, the lien shall extend to any money that may be received by the tenant as indemnity for the destruction of said property, nor shall the lien be lost by the sale of the said property, except merchandise sold in the usual course of trade or to purchasers without notice of the tenancy. The provisions of this act shall not apply to, nor shall it be enforced against, the property of tenants in dwelling-houses or apartments or any other place that is used exclusively as a home or residence of the tenant and his family.

“2. ENFORCEMENT. Said lien may be enforced in the same manner as the foreclosure of a chattel mortgage in the superior court of the county in which the property or any portion thereof is situated.”

A

But Appellee filed his claim as a general, unsecured claim thereby waiving his security or right to priority.

Collier on Bankruptcy (12 ed.) pg. 1016.

7 *C. J.* 338.

In re Fisk, 185 Fed. 974.

Brown vs. City Natl. Bank, 72 Misc. 201, 131
N. Y. S. 592, 26 A. B. R. 638.

B

As above stated this claim was filed on Sept. 10, 1921. At that time Appellee might have claimed a lien for rent due from July 10 to Sept. 10, 1921, or, more properly, might have filed a claim for rent as a lien claim from July 10, to July 21, 1921, (date of filing petitions in bankruptcy) and a petition for an allowance for rent as an expense of administration from July 21, to Oct. 1, 1921.

Trustee contends that the Washington statute fixes (1) a period of duration for a lien at two months and (2) also is a statute of limitations of two months, during which foreclosure must be commenced. We do not see how any other construction can be put upon the language of the statute, especially

“Such lien shall not be for more than two months rent due or becoming due, *nor for any*

rent or any installment thereof which has been due for more than two months."

Lien statutes commonly provide for a period of duration of the lien and a time within which foreclosure must be commenced. It seems plain to us that this statute makes such a provision and that a lien can be claimed for not more than two months and that it must be foreclosed as to any installment before that installment is more than two months old. If this is not a true construction, then what meaning can be given to the words:

"Nor for any rent or any installment thereof which has been due for more than two months."

Such is the construction given this statute by the Superior Court of the State of Washington in *Culp vs. McMehan*, now on appeal to the Supreme Court, wherein a decision may be expected any day.

The fact that bankruptcy intervened on July 21, does not affect the rights of either party. The landlord could have foreclosed his lien at any time in the State Court.

In re. San Gabriel Sanitarium, 111 Fed. 892
(9 C. C. A.).

Bankruptcy does not abate or prevent lien foreclosures in the State Court.

Collier on Bankruptcy (12 ed.) pg. 1051-1053.

To secure a lien given by statute one must bring himself within the terms of the statute and a receivership does not alter the rule.

Brown vs. Hunt & Mottet Co., 111 Wash. 564, 191 Pac. 860.

The landlord could have filed his petition with the Referee asking foreclosure of his lien. The Federal Court has jurisdiction.

Rem. on Bankruptcy, Sec. 1885-1888.

If bankruptcy had not intervened, it is obvious that the landlord on Sept. 10, 1921, had lost his lien for rent for the month of June and from July 1 to July 10. He could only claim a lien for two months between July 10 and Sept. 10. Had he gone into the State Court to foreclose his lien that is the utmost relief to which he was entitled. Instead, he filed his claim in bankruptcy with the Referee on Sept. 10, and has no greater rights in the bankruptcy court than he would have in the State Court.

II.

The Referee found that a reasonable rental for said premises was \$300.00 per month and the District Court affirmed this ruling of the Referee and modified the Order so as to run from July 21 to Oct. 5.

The record is very short and gives the testimony of the witnesses within the compass of nine pages (R. 21-29). As a matter of law we submit the testimony of Appellee was incompetent to show the *quantum meruit* value of the premises occupied by the Trustee from July 21, 1921, to Oct. 5, 1921. The occupancy was temporary as all knew. It was used as a place of storage. Appellee's testimony was solely upon the basis of its value in a long time lease, say a 5 year lease. On the other hand, Appellant's witnesses testified to its value for temporary occupancy. This was to the point and fixed the real value of the premises within the contemplation of the parties and the law. The Trustee believes no weight should be given to testimony fixing the value of the premises on the basis of the value of a long term lease. The only testimony as to value for temporary purposes was that the fair market rental was \$100.00 per month.

The estate is not liable under the lease but on *quantum meruit*.

In re Fraser, 183 Fed. 28.

Collier on Bankruptcy (12 ed.) pg. 982.

The assets of this estate were less than \$4000.00 and to charge this estate with \$1378.89 for rent is oppressive and unjust; especially in view of the injunctions of the Act for economy.

III.

The claim filed by Appellee was for rent for June, July, August and September. (R. 2-5). It did not cover any part of October. Nor was an amended claim filed. The Referee allowed said claim to and including Oct. 5, and the Order was affirmed by the District Court. It is undisputed and is admitted by Appellee that on Sept. 1, 1921, the landlord executed a lease to said premises with one Simon, said lease to commence Oct. 1, and that said Simon had paid the rent from Oct. 1 to January 1. (R. 27-29). In fact, Mr. Simon moved his stock of goods in cases into the premises about the middle of September and occupied the front half of the store from that time on until the Trus-

tee sold the Bankrupt's goods and fixtures on Oct. 4. No compensation was allowed the Trustee in Bankruptcy for such occupancy.

The Trustee contends that the landlord is not entitled to collect any rent from this estate after Oct. 1. On Oct. 1, Appellee parted with his leasehold interest. After Oct. 1 the leasehold was the property of the lessee Simon. The landlord had parted with title and could not possibly be entitled to rent from both Simon, from whom he actually collected, and also from the bankrupt estate. To permit it is to allow Appellee to collect double rent for the same period for the same premises. This is obviously unjust and without any legal basis.

This would reduce the sum allowed the landlord by \$50.00—5 days rent at \$300.00 per month or \$10.00 per day.

In conclusion we submit that claim for rent as a preferred claim prior to bankruptcy was waived the same as a suit filed in any Court making no allegations setting up a right of lien and no prayer for foreclosure of a lien is held a waiver of lien.

If not, if Appellee is entitled to a lien at all, the claim should be allowed as follows:

June 1-July 10, General claim @	
\$375.00	\$507.92
July 10-July 21, Secured claim @	
\$375.00	120.97
July 21-Oct. 1, Trustee's expense of	
Administration @ \$100.00 per	
month	233.33
Oct. 1-Oct. 5, Disallowed, (premises	
leased) Oct. 1 and paid by lessee	000.00

Respectfully submitted,

NELSON R ANDERSON,

Attorney for Appellant.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In the Matter of

J. H. McNEICE and FRED McNEICE,
Individually and as Co-partners,
Doing Business Under the Name and
Style of McNEICE FURNITURE CO.,
Bankrupts.

DOLPH BARNETT, as Trustee of
J. H. McNEICE and FRED McNEICE,
Individually and as Co-partners, Doing
Business as McNEICE FURNITURE
COMPANY, Bankrupts,

Appellant,

vs.

O. A. SPROAL,

Appellee.

BRIEF OF APPELLEE.

GRADY, SCHUMATE & VELIKANJE,

Attorneys for Appellee.

516 Miller Bldg.,
Yakima, Wash.

FILED

No. 3936.

**United States Circuit Court
of Appeals**
FOR THE NINTH CIRCUIT.

In the Matter of

J. H. McNEICE and FRED McNEICE,
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DOLPH BARNETT, as Trustee of
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COMPANY, Bankrupts,

Appellant,

vs.

O. A. SPROAL,

Appellee.

BRIEF OF APPELLEE.

GRADY, SCHUMATE & VELIKANJE,

Attorneys for Appellee.

516 Miller Bldg.,
Yakima, Wash.

STATEMENT OF THE CASE.

On July 21, 1921, an involuntary petition in bankruptcy was filed, a hearing had, and on August 13, 1921, the co-partners doing business under the name of McNeice Furniture Company were adjudicated. The co-partnership had been occupying several rooms of the ground floor of a building owned by appellee, O. A. Sproal, under a written lease providing for a rental of \$375.00 per month. A meeting of the creditors was held for the purpose of electing a trustee. Mr. Sproal had filed his claim, but at the meeting of creditors the bankrupts and all creditors represented objected to his voting upon the ground that his claim was a preferred one, and he thereupon refrained from so doing. The appellant was elected trustee September 10, 1921.

Sometime previous to these proceedings the bankrupts had made an assignment to F. C. Hall for the benefit of creditors, the assignee had continued to operate the business for their benefit and continued to occupy the building covered by the lease, and after the trustee was appointed he continued to use and occupy the same premises as was

covered by the lease until the sale of the assets of the bankrupts was had Oct. 5, 1921 (R. pg. 27).

The claim of the appellee was allowed by the Referee, as follows:

Rental under the lease from June 1, 1921 to date of adjudication....	\$ 907.45
Rental at a reasonable basis, as ex- pense of administration fixed at \$300 per month from adjudica- tion to surrender of premises by trustee, October 5, 1921.....	518.30
	<hr/>
	\$1425.75

An appeal was taken from this order to the U. S. District Court, for the Eastern District of Washington, and in a written opinion by Judge Rudkin the order was modified in this:

Rent at contract rate of \$375 per month from June 1, 1921 to the date of filing the petition instead of date of adjudication.....	\$ 628.89
Expense of administration at \$300.00 per month from July 21, 1921 to October 5, 1921.....	750.00
	<hr/>
	\$1378.89

From the order of the Court thus entered this appeal was taken.

ARGUMENT

The first contention of appellant is that the claim was a general one because the blank form used was one appropriate for unsecured claims—the kind of blank form used being the criterion rather than the character of the indebtedness. This question was not raised in the court below on appeal from the Referee, and it is a rule of quite universal application that questions not going to the jurisdiction of the court not raised in the court below will not be considered on appeal.

Secondly, this indebtedness for which the appellee makes claim is a preferred claim, a portion of it being preferred by virtue of the fact that a statutory lien exists therefore, and the other portion of it being preferred as expenses of administration. There are two classes of “secured” claims.

(1) Those evidenced by some instrument in writing.

(2) Those given preference by operation of law or some statute creating a lien.

This claim in part falls within the latter class, and all of it is a preferred claim. It was not filed as an unsecured claim, but the facts surrounding it were set forth and they govern its character.

The application of Chapter 165 of the Session Laws of 1917 of Washington (Section 1203 Rem. Comp. St., Wash.) as quoted on pages 8 and 9 of the Brief of Appellant, has not in our opinion been correctly applied by him.

In this case rental was accruing at the rate of \$375.00 per month, but said contract for rental was terminated on July 21, 1921, by the filing of the Petition in Bankruptcy. This was so held by the trial court and neither party is objecting thereto. When this happened the appellee then and there became entitled to a preferred claim for two months rent. If the interpretation of the statute adopted by appellant is correct the claim of lien would have to be asserted in some manner by the appellee within two months from said date. This the appellee did by filing his claim with the Referee in Bankruptcy on the 21st day of September, 1921, (appellant states September 10, 1921), thus bringing himself within the contention that no claim could be made for any rent which had been due for more than two months. It will be seen from this that the appellee only claims rent for the month of June and for July to the date of the filing of the petition, to-wit: July 21, 1921, and has made claim for same within two months from said date.

We do not want to be understood by this as agreeing with the appellant in his interpretation of this statute as we think the provision that the lien shall not be for more than two months rent is a limitation upon the amount of the lien, and the provision that the lien shall not be for any rent which has been due for more than two months is a limitation upon the time for which it can be claimed and has nothing to do with the time of commencing the appropriate action to foreclose the same as provided by Section 2 of the lien law. We contend that this statute does not fix a time within which an action shall be commenced to foreclose the lien as is usual in lien statutes. The question of when an action should be commenced to foreclose a lien under this statute in the absence of an express provision therefor is not now before the court and for the purpose of this case is an academic one and though interesting we will not pursue it further.

We filed our claim within two months from the date of the filing of the Petition and we were allowed by the trial court a preferred claim for the unpaid rental up to the date of the filing of the Petition, which was less than rent for two months. We have been unable to find any rule of law which

required the appellee to do more than file his claim in the bankruptcy proceedings and assert his preference under the statute for such part of the rent as was owing up to the date of the filing of the Petition for not exceeding two months.

The appellant contends that he should not be chargeable with rental during the period of his occupancy of the leased premises from the time the Petition was filed. An attempt was made by the appellant to show that he had vacated a part of the premises and therefore should not be held for only the reasonable rental value of the portion he did occupy. This contention is not borne out by the evidence. A careful reading of the evidence in the record will show that the preponderance thereof is to the effect that the trustee continued to occupy and held dominion over the entire premises covered by the lease and that some of the property of the bankrupts in his charge was kept in the rooms he now contends had been vacated. No key was surrendered to the appellee and he neither had opportunity to, nor right or authority, to rent any part of the premises to anyone while the trustee was in possession. It is quite true, as stated by the trial judge in his opinion, that the trustee had probably kept the premises

longer than necessary and thereby added an unnecessary expense to the estate, but the fault is not with appellee and he should not bear the loss caused by this error in judgment.

We wish to refer to the first and second lines of the Brief of appellant on page 14, and the citations thereunder. Collier on Bankruptcy (10th Ed.) Page 881 says:

“The trustee, however, usually retains possession for a brief period paying on a *quantum meruit* basis meanwhile.”

The author cites in support of his text *in re Fraser* 183 Fed. 28. The text supports the view of the referee and trial court that during the time the trustee occupies the premises he must pay rental not on the basis prescribed in the lease but by what the court finds to be the reasonable value of the use thereof.

The Referee found, and his finding was sustained by the Trial Judge, that the appellant had continued in possession of the premises until October 5, 1921, and also that the reasonable rental value of the premises to be charged against the estate as expenses of administration was \$300.00 per month. There is ample evidence in the record to sustain this

finding and we can see no reason why it should be disturbed by the appellate court. The appellant is in no position to claim an unjust or oppressive burden upon the estate as he, and he only, is responsible therefor. There was nothing to prevent him from vacating the premises and moving the assets of the bankrupts into less commodious and expensive quarters.

We feel in some of the remarks made by the appellant in his Brief that he has gone somewhat outside of the record, and especially with reference to rent collected from Mr. Simon, to whom the property was leased and who, took possession after the appellant vacated. There is no testimony in the record showing that Mr. Simon paid any rent for any of the period of time until he got possession October 5, upon which to base the contention of the appellant that five (5) days rent at \$300.00 per month, or \$50.00 should be deducted from the claim as it now stands. The record shows (R. 27) that it was not practicable to rent the front end of the store without the rear end, unless a partition was put in; furthermore, this could not be done until the trustee vacated. Mr. Simon was allowed by the trustee to store some of his goods and because on his promise.

to vacate, Mr. Simon had brought goods to Yakima, and the trustee failing to move as agreed, extended this privilege to Mr. Simon. This action on the part of the trustee did not in any way diminish his obligation to pay appellee for the use of the premises, possession of which he still retained and which he did not surrender to him.

In closing we desire to point out what is seemingly a typographical error in the record. The order modifying the order of the Referee (R. 12-13) refers in two places to July 1, 1921. The figures computed, clearly show this to be an error and that it should be July 21, 1921. This is borne out by the opinion of the trial judge (R. 14-16) wherein the date July 21, is clearly shown.

We submit that the order made by the Trial Judge in allowing the claim of the appellee is correct and should, in all respects be affirmed.

Respectfully submitted.

GRADY, SHUMATE & VELIKANJE,
Attorneys for Appellee.

Since writing the foregoing, and after the same was set up by the printer, we were favored by appellant with a copy of the decision of the Supreme Court of Washington, in the case of *Culp vs. Mc-Mehan*, decided February 10, 1923, which holds that the lien for rent provided for by the statute quoted is not enforceable unless the action therefor is brought within two months of the time the rent which it is sought to recover becomes due. With this construction of the Washington statute settled by the Supreme Court, still we contend the trial court did not err in allowing our claim as it did.

The decision refers to the case of *McDermott vs. Tolt Land Company*, 101 Wash. 114. Our position is that as long as we chose to file our claim for rent in the bankruptcy proceedings, and that if we did so within two months from the time the rent we claim became due, the Court could allow such rent as a preferred claim. The claim was for rent for June and up to July 10th, less than two months, and was asserted by filing a claim in the bankruptcy proceedings within two months from July 10th. 1 2 1.

In the McDermott case the court said: "The Court concluded from these facts: 1st, that the action was not commenced within the time limited by

statute; 2nd, that the plaintiffs waived their liens by filing the claims with the referee and elected thereby to have their claims satisfied from the assets of the bankrupt estate. If the court was correct in either of these conclusions the judgment must be affirmed."

The court then proceeded to sustain the judgment upon the first ground, and later in the opinion stated that by bankruptcy proceedings the claimants were not prevented from foreclosing their liens in the state court, but if they desired to do so they must commence their action within the time prescribed by statute. We can find no case where it has been held that the claimant cannot elect to file and assert his claim in the bankruptcy proceedings, and look solely to the assets of the bankrupt.

We think the law applicable to this case is that when the appellee filed his claim in the bankruptcy proceedings, and did so within two months from the time the rent he claimed therein became due, he was entitled to have such rent allowed as a preferred claim, and that although he might have maintained an action to foreclose his lien in the state court regardless of the bankruptcy proceedings, he was not obliged to do so and could elect to file his claim, with the Referee and look to the assets of the bankrupt.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

J. H. McNEICE and FRED McNEICE,
Individually and as Copartners,
Doing business under the name and
style of McNEICE FURNITURE CO.,
Bankrupts.

DOLPH BARNETT, as Trustee of J. H.
McNEICE and FRED McNEICE, Individually
and as Copartners, doing business as
McNEICE FURNITURE COMPANY,
Bankrupts,

Appellant,

vs.

O. A. SPROAL,

Appellee.

REPLY BRIEF OF APPELLANT

LOGAN ROBERTS,
ROBERTS & ROBERTS,
NELSON R. ANDERSON,
Attorney for Appellant.

No. 3936.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

J. H. McNEICE and FRED McNEICE,
Individually and as Copartners,
Doing business under the name and
style of McNEICE FURNITURE CO.,
Bankrupts.

DOLPH BARNETT, as Trustee of J. H.
McNEICE and FRED McNEICE, Individually
and as Copartners, doing business as
McNEICE FURNITURE COMPANY,
Bankrupts,

Appellant,

vs.

O. A. SPROAL,

Appellee.

REPLY BRIEF OF APPELLANT

NELSON R. ANDERSON,
Attorney for Appellant.

Brief of appellee, page 2, states that all creditors objected to the landlord voting his claim upon the ground that said claim was preferred. This statement is not borne out by the record. The record, page 21, contains the ruling of the Referee that he did not pass upon the question whether the claim should be voted or not. Besides, it is perfectly obvious that the claim filed, being for the most part an expense of administration, was not a provable claim.

Colman vs. Withoft, 195 Fed. 250, 28 A. B. R. 328 (9 C. C. A.).

Only creditors proving an indebtedness due at the time of bankruptcy have the right to vote.

Remington on Bankruptcy, Sec. 573.

Brief of appellee, page 5, says his claim was filed with the Referee on the 21st day of September, 1921, whereas appellant had given the date of filing as September 10th, 1921. We accept this correction.

Brief of appellee, page 10, points out a typographical error in the record, pages 12 and 13, where the order of the District Judge refers in two places to July 1st, 1921, whereas the order should be July 21st, 1921. This correction should be made.

ARGUMENT.

I.

The first question presented by this appeal involves the meaning of Sec. 1203-1 of Rem. Comp. Stat. (Washington). Since the writing of our opening brief this statute has been construed by the Supreme Court of the State of Washington in *Culp vs. McMehan*, decided February 10, 1923, reported in Vol. 23, No. 6, page 339, Washington Decisions.

On December 14, 1921, Culp brought suit to foreclose a landlord's lien for rent due for the prior month of August and September on certain property purchased by McMehan at a receiver's sale. The court said:

“The first question to be considered involves the meaning of Sec. 1203-1 of Rem. Comp. Stat., which, in so far as it is material to the question involved, provides:

‘Any person to whom rent may be due,
* * * shall have a lien for such rent which is paramount to, and has preference over, all other liens. Such liens shall not be for more than two months' rent due or to become due, nor for any rent or any installment thereof which has been due for more than two months.’

The action was brought on December 14, 1921, to foreclose the lien for rent due for the prior months of August and September, which rent, under the terms of the lease, was payable in advance, thus becoming due on the first day of each such month.

The appellants argue that the provisions of the statute quoted should not be construed as limiting the time within which an action to enforce a landlord's lien must be brought, but should be construed as restricting the right of lien to cover a two months' period. We cannot accept this view. The statute could possibly be held to bear that meaning were it not for its last provision, namely, the provision reading 'nor for any rent or any installment thereof which has been due for more than two months.' This provision is clear and explicit and, in our opinion, leaves no room for doubt as to the meaning of the statute; it means that the lien is not enforceable unless the action herefor is brought within two months of the time the rent which it is sought to recover becomes due."

In the case at bar the court allowed rent from June 1, 1921, to July 21, 1921, (date of filing petitions in bankruptcy) at the rate of \$375.00 per month as a preferred claim (R. 13).

The lease provides that the June rent was payable on the first day of June and the July rent was payable on the first day of July, 1921. (See lease on file under stipulation of counsel.)

For the June rent the landlord had a lien for two months or until the first day of August, and for

the July rent he had a lien for two months or until the first day of September. After September 1st the life of both liens had run and thereafter ceased to exist.

On September 21, 1921, appellee filed his claim with the Referee. At that time (Sept. 21, 1921) the June rent was three months twenty days past due and the July rent was two months and twenty days past due. The lien had expired through failure to foreclose in the State Court or in the Bankruptcy Court within two months after the rent became due.

Appellee contends that he may file his claim as a preferred claim for rent within two months of the institution of the bankruptcy proceedings. The answer to this is the statute itself, which provides that the action must be instituted *within two months of the time the rent became due*. In this case the rent became due on June 1st and July 1st, and the lien for same expired on August 1st and September 1st, respectively. If appellee's contention were true he could claim a lien for rent due in 1918 or 1919 or 1920, provided he filed his claim in the bankruptcy court within two months of bankruptcy proceedings instituted in 1921. This contention of appellee is expressly denied in the *Culp* case just

decided by the Supreme Court and by the cases cited therein.

A second ground for denying appellee a preferred claim is that his claim was filed as a general, unsecured claim and this was a waiver of the right to a lien. See appellant's opening brief, pages 9 and 10.

A third ground for denying appellee a preferred claim for rent from June 1st to July 21, 1921, is that the Washington statute does not give a lien on any specific assets and that the lien is inchoate until foreclosure proceedings are commenced to perfect it. Such liens as are given by the Washington statute have been held to be inchoate and, unless foreclosure is brought prior to bankruptcy proceedings, such a lien is inferior and subordinate to the lien conferred upon the Trustee in Bankruptcy under the amendment of 1910 to Sec. 47a (2).

Henderson vs. Mayer, 225 U. S. 638; 32 Sp. Ct. 699, 56 L. Ed. 1233.

So. Ry. Co. vs. Wilder, 231 Fed. 933 (C. C. A. 5).

Pretorius vs. Anderson, 236 Fed. 725 (C. C. A. 5).

That the Trustee has a lien upon all assets in his possession under Sec. 47a (2) as amended by the amendment of 1910 has been held by this court:

Pac. State Bank vs. Coats, 205 Fed. 618.

Meier & Frank vs. Sabin, 214 Fed. 231.

Scand. Am. Bank vs. Sabin, 227 Fed. 579.

The Trustee believes that the above three legal grounds, or any one of them, sufficient to defeat the landlord's claim as a preferred claim from June 1st to July 21, 1921. The claim should be allowed as a general, unsecured claim only.

II.

Brief of appellee, page 4, says there are two classes of secured claims and that the claim for rent after date of bankruptcy was an expense of administration and should be paid in full. This is not questioned by the Trustee in Bankruptcy. From July 21, 1921, (date of filing involuntary petitions in bankruptcy) to October 1, 1921, the claim for rent is entitled to priority of payment as an expense of administration, and the Trustee has always been willing to allow it and to pay it in full in such sum as the court may allow. Under the Washington statute above quoted appellee could claim a land-

lord's lien from July 21, 1921, to Oct. 1, 1921. It is immaterial whether the claim for said period is allowed as an expense of administration or as a lien claim. In either event, the Trustee is willing to pay it in full in such sum as the court may allow.

As to this part of appellee's claim the only question raised by the appeal is as to the amount of the claim. The Trustee claims that \$100.00 per month is the fair market value of the premises when used for temporary purposes. The court below fixed the reasonable rental value at \$300.00 per month.

As in his opening brief, pages 13 and 14, appellant contends that the only evidence of value of said premises for a temporary purpose was given by witnesses for the Trustee and fixed by them at \$100.00 per month. The evidence establishes that the premises would have remained vacant and the landlord would have lost the entire amount of his rent. Bankruptcy cases are equity proceedings in which the equities of all parties should be considered and adjusted.

Bardes vs. Bank, 178 U. S. 533.

In re. Waugh, 133 Fed. 281 (9 C. C. A.).

It seems just and equitable that the landlord should bear part of the loss entailed by this bankruptcy rather than that he should be paid in full and the entire loss fall upon all the other creditors.

Appellee argues that the Trustee might have moved the merchandise and fixtures to a cheaper location. In this case, as in all cases, the Trustee continued in possession in order to sell the business as a going concern and to take advantage of the good will attaching to the business. It is one thing to sell a business as it stands in its place of business and another thing to move the goods to a place of storage and there sell them as junk or piecemeal. The usual and ordinary course of procedure is for the Trustee to advertise for bidders and his most likely prospects are those who wish to go into business permanently or to take over the premises and sell off the goods at special sale. The landlord in this case blocked such a course and prevented the Trustee from selling the business as a business by leasing the premises on September 1st, and giving the lessee the right of occupancy on October 1st (R. 28-29).

Also, the record shows that the assignee notified the landlord that he could have the occupancy of

the front room of the premises in July (R. 21). The new lessee actually moved his goods into the front room about the middle of September (R. 25). In every case where a merchant moves his goods into a new location it takes time to assemble the cases of merchandise and the fixtures, to open the merchandise, set up the fixtures and make ready for business. This course was followed in this case at the expense of the Trustee in Bankruptcy.

We believe the equities of the case are with the Trustee and that the estate ought not be consumed by expenses of administration. Estates must be economically administered.

Rem. on Bankruptcy, Sec. 24.

III.

Brief of appellee, page 9, says there is no testimony in the record showing that the appellee had collected rent from Oct. 1st to the first of the year from the new tenant, Mr. Simon. The record shows that the lease was entered into on the first of September and was to commence October 1st (R. 27).

Appellee's agent testified:

“The lease to Simon is a five year lease at \$350.00 a month, payable monthly in advance.

of which Mr. Simon has paid the first and last month's rent. It was executed September 1st, 1921, and commenced to rent from October. Mr. Simon has already paid his rent up to the first of January." (R. 28-29.)

The record plainly shows that these premises were leased to one Simon and that the lease was executed September 1st and was effective October 1st. On October 1st Simon was lessee of said premises and entitled to their possession. He had moved into the front part of the store the middle of September and after October 1st the premises were Simon's under his lease.

The avarice of landlords has lead to the characterization of "landlord hog." We cannot think that the Trustee can be forced to pay rent after October 1st to a landlord who has parted with title to the premises by executing a lease to a new lessee effective October 1st; that the landlord can collect from said lessee and again from the trustee.

The claim filed was for June, July, August and September rent. It made no claim to rent for any part of October. No amended claim was filed. Such claim must be made in writing and sworn to.

The allowance for Oct. 1-5 is not warranted by the proof of claim.

CONCLUSION.

Appellant respectfully submits that the claim of appellee should be allowed as follows:

June 1 to July 21, General Claim....	\$628.89
July 21 to Oct. 1, Trustee's Expense of Administration at \$100 per mo.	233.33
Oct. 1 to Oct. 5, Claim Disallowed....	00.00
(Premises leased Oct. 1.)	

Respectfully submitted,

LOGAN ROBERTS,

ROBERTS & ROBERTS,

NELSON R. ANDERSON,

Attorneys for Appellant.

No. 3337

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHARLES F. FRIES,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court, for the Southern District of Cal-
ifornia, Southern Division.

FILED

OCT 27 1922

F. D. MONCKTON,
CLERK

No.

United States
Circuit Court of Appeals
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CHARLES F. FRIES,

Plaintiff in Error,

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Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys:

For Plaintiff in Error:

H. H. HARRIS, Esq., Title Insurance Building,
Los Angeles, California.

CLYDE R. MOODY, Esq., Title Insurance Build-
ing, Los Angeles, California.

For Defendant in Error:

JOS. C. BURKE, Esq., United States Attorney and
T. F. GREEN, Esq., Assistant United States At-
torney.

IN THE DISTRICT COURT OF THE UNITED
STATES, SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN
DIVISION.

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs	)	Citation
	)	on Appeal
CHARLES F. FRIES,)	
)	
Defendant.)	

UNITED STATES OF AMERICA - - SS

The President of the United States, to Joseph C. Burke
Esq., United States Attorney in and for the
Southern District of California,

GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, within 30 days from the date hereof, pursuant to an order allowing an appeal of record in the clerk's office of the United States District Court for the Southern District of California, Southern Division, wherein Charles F. Fries is appellant and the United States of America is appellee, to show cause, if any there be, why the order and judgment of the court rendered against the appellant as in the said order allowing appeal men-

tioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Hon. Benjamin F. Bledsoe, United States District Judge for said District, this Sept 13 1922.

Bledsoe

United States District Judge.

[Endorsed]: No. 280 Rem. UNITED STATES DISTRICT COURT Southern District of California Southern Division In the matter of UNITED STATES OF AMERICA, Plaintiff vs. CHARLES F. FRIES, Defendant. CITATION ON APPEAL Filed Sept. 14, 1922. Chas. N. Williams, Clerk. By R S Zimmerman, Deputy. Recd. copy of within this 13th day of Sept. 1922. Mark L. Herron CLYDE R. MOODY and H. H. HARRIS Attorneys for defendant. 346 Title Insurance Bldg. Los Angeles, California.

UNITED STATES OF AMERICA, SS.

The President of the United States of America,

To the Judges of the District Court of the United States, for the Southern District of California,
GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you between Charles F. Fries, Plaintiff in error, and United States of Amer-

ica, Defendant in error, a manifest error hath happened, to the great damage of the said Charles F. Fries as by his complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 11th day of October next, in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

WITNESS, the HON. WILLIAM H. TAFT,
Chief Justice of the United States, this 13th
day of September in the year of our Lord one
thousand nine hundred and twenty-two and
of the Independence of the United States the
(Seal) one hundred and forty-seventh.

CHAS N WILLIAMS,

Clerk of the District Court of the United States of
America, in and for the Southern District of
California.

By R S ZIMMERMAN

Deputy Clerk.

The above writ of error is hereby allowed.

Bledsoe

Judge.

I hereby certify that a copy of the within Writ of
Error was on the 14th day of September, 1922, lodged
in the office of the Clerk of the said United States
District Court, for the Southern District of California,
Southern Division, for said Defendants in Error

Chas. N. Williams

Clerk of the District Court of the United States for
the Southern District of California.

By R S Zimmerman

(Seal)

Deputy Clerk.

[Endorsed]: 280 Rem United States Circuit Court
of Appeals for the NINTH CIRCUIT CHARLES
F. FRIES, Plaintiff in Error vs. UNITED STATES
OF AMERICA, Defendants in Error Writ of Error
FILED Sep 14 1922 CHAS. N. WILLIAMS, Clerk
By R S Zimmerman Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

UNITED STATES OF)

AMERICA)

Plaintiff,)

-vs-

PETITION FOR
WARRANT OF
REMOVAL UNDER
SEC. 1014 R. S.

CHARLES F. FRIES,)

Defendant.)

Comes now, T. F. Green, Assistant United States Attorney for this district, and presents to the Court a certified copy of Final Commitment issued by the United States Commissioner for this district, showing that the defendant CHARLES F. FRIES, was by him held for an Order of Removal to the Eastern Division of the Northern District of Illinois in which district the offense for which the said prisoner has been committed is to be tried, and prays the Court for the issuance of a Warrant of Removal of the said CHARLES F. FRIES to the said Eastern Division of the Northern District of Illinois there to deliver him to the United States Marshal for said district, or to some other proper officer authorized to receive said

defendant, that he may be dealt with according to law.

Joe Burke

United States Attorney.

T. F. Green

Assistant United States Attorney.

[Endorsed]: No. 280 Rem IN THE District COURT OF THE UNITED STATES FOR THE *Southern of California* UNITED STATES OF AMERICA Plaintiff vs. CHARLES F. FRIES Defendant. Petition for Warrant of Removal Under Sec. 1014 R. S. Filed Jan. 9, 1922 Chas. N. Williams, Clerk. By Douglas Van Dyke, Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

UNITED STATES OF)	
AMERICA,)	
Plaintiff,)	NOTICE OF
-vs-)	APPLICATION FOR
CHARLES F. FRIES,)	ORDER OF
Defendant.)	REMOVAL.

TO CHARLES F. FRIES and his Attorney H. H. HARRIS, Title Insurance Building, Los Angeles, Cal.

You will please take notice that the plaintiff in the above entitled action, United States of America, will apply to the Honorable Judge of the District Court of the United States, in and for the Southern District of California, Southern Division, at the United States Court house in the Federal Building in the City of Los Angeles, California, on the 5th day of December, A. D., 1921, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, for an order of removal directing the removal of CHARLES F. FRIES, to the jurisdiction of the United States District Court for the District of the Eastern Division of the Northern District of Illinois, sitting at the City of Chicago, within said District, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the District Courts of the United States, in order that the said CHARLES F. FRIES, may be there dealt with according to law.

Said application will be based upon the order and decision heretofore, to-wit: on the 8th day of November, made and entered by Stephen F. Long, Esq., United States Commissioner, duly appointed and acting as such, under and by which said order and decision the said Commissioner found and adjudged that the offense mentioned and described in the complaint sworn to and filed with the said United States Commissioner, on the ——— day of —————, against the said CHARLES F. FRIES, wherein the said FRIES is charged with having, on or about the

1st day of January, 1918, knowingly, wilfully, unlawfully and feloniously conspired with divers other persons to violating Section 215, Federal Penal Code, as set forth in a certain indictment filed by the Grand Jury for the Eastern Division of the Northern District of Illinois, and will more fully appear from said complaint, reference to which is hereby made, has been committed, and that probable cause exists to believe the said CHARLES F. FRIES guilty thereof.

Said application will be made upon each and all of the papers, documents and pleadings filed in the said proceeding against said FRIES by the said United States Commissioner, and upon the findings, judgment and commitment made and issued by the said Commissioner in said proceeding on the said 8th day of November, A. D. 1921, a copy of which commitment is hereto attached and made a part hereof, and also upon a certain certified copy of the original indictment filed in the office of the Clerk of the United States District Court for said District in Illinois, and which said certified copy of said indictment has been heretofore filed and has been on file with the United States Commissioner and entitled: "United States of America vs. CHARLES F. FRIES" of the records of said Commissioner.

Dated this 29th day of November, 1921

Robert O'Connor

United States Attorney.

T. F. Green

Assistant United States Attorney.

[Endorsed]: No. 280 Rem IN THE District COURT OF THE UNITED STATES FOR THE *Southern of* California UNITED STATES OF AMERICA, Plaintiff vs. CHARLES F. FRIES, Defendant. Notice of Application for Order of Removal. Filed Nov 30, 1921 Chas N Williams, Clerk. By R S Zimmerman, Deputy. Received Copy this day of Nov 1921 H. H. Harris

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT
OF CALIFORNIA, SOUTHERN
DIVISION.

United States of America,)	
)	
Plaintiff,)	
)	
vs.	)	No. 280 Removal
)	
Charles F. Fries,)	
)	
Defendant.)	
)	

: : : : : : : : : :
 Jos. C. Burke, United States Attorney for the
 United States.

Clyde R. Moody and H. H. Harris of Los Angeles,
 Cal., for the Defendant.

MEMORANDUM OPINION.

Bledsoe, District Judge:- In this matter, I have gone over carefully the exhibits submitted and the

three hundred and fifty page transcript of evidence taken. In my judgment, the indictment states an offense under the law and was sufficient to constitute a prima facie case justifying the removal of the defendant. The evidence offered in his behalf, considered in connection with that tendered by the government in rebuttal thereof, does not suffice to overcome the prima facie case made by the indictment.

From the whole record, I am constrained to conclude that there is ample probable cause for the holding of the defendant for trial upon the charge presented.

An order of removal will therefore be entered.

April 19, 1922.

[Endorsed]: No. 280 Removal. UNITED STATES DISTRICT COURT Southern District of California Southern Division. United States of America, Plaintiff, vs. Charles F. Fries, Defendant. MEMORANDUM OPINION. FILED APR. 19 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman, Deputy Clerk.

At a stated term, to wit: The January Term. A. D. 1922 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 19th day of April in the year of Our Lord one thousand nine hundred and twenty-two.

Present:

The Honorable BENJAMIN F. BLEDSOE, District Judge.

United States of America,)	
Plaintiff,)	
vs.	)	No. 280 Rem.
Charles F. Fries,)	
Defendant.)	

In accordance with a memorandum opinion filed herein this date, the court of its own motion signs a warrant removing defendant herein to the Eastern Division, Northern District of Illinois.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT
OF CALIFORNIA, SOUTHERN
DIVISION.

UNITED STATES,)	
)	
Plaintiff,)	
vs.	)	PROPOSED BILL OF
	)	<u>EXCEPTIONS.</u>
CHARLES F. FRIES,)	
)	
Defendant.)	

The Defendant appeared in person before Honorable Stephen G. Long, U. S. Commissioner, on proceedings for removal from the Southern District of California to the Southern District of Illinois, Eastern Division.

The Government was represented by Edwin L. Weisl, Esq., Assistant U. S. Attorney, for the Northern District of Illinois.

The defendant was represented by H. H. Harris, Esq., and Clyde R. Moody, Esq., of Los Angeles, California.

Said appearance was on November 5, 1921, at 9 o'clock A. M..

Whereupon the Government introduced a certified copy of Indictment No. 7303 returned in the Northern District of Illinois, Eastern Division, by the Grand Jury in that District, in words and figures as follows:

IN THE DISTRICT COURT OF THE UNITED
STATES OF AMERICA FOR THE
NORTHERN DISTRICT OF
ILLINOIS, EASTERN
DIVISION.

Of the October Term,
in the year 1920.

First Count.

Northern District of Illinois,)
)

Eastern Division;)ss. - - The grand jurors for the United States of America empaneled and sworn in the District Court of the United States for the Eastern Division of the Northern District of Illinois at the October Term of said court in the year 1920, and inquiring for said division and district, upon their oath present, that DANIEL HAYES, JOHN

H. ROGERS, OSCAR C. LAMP, LOUIS F. COURTNER, LESLIE L. PALMER, THOMAS J. SEFTON, CLYDE L. PECK, RALPH W. WEST, CHARLES E. ZIMMERMAN, MATTHEW J. BENICE, EVERETT E. HARRISON, EDWARD G. DAVIS, STEPHEN LALOR, BEN H. BRAINERD, CHARLES F. FRIES, WILLIAM H. FRIES, and R. M. ANDERSON and C. W. PORTER, whose Christian names respectively are to said grand jurors unknown, hereinafter referred to as defendants, continuously throughout the period of time from January 1, 1918, to February 24, 1920, at Chicago aforesaid, in said Eastern Division of said Northern District of Illinois, unlawfully and feloniously did conspire, combine, confederate and agree together, and with divers other persons to said grand jurors unknown, to commit divers, to wit, one thousand, offenses against the United States, in the manner and by the means and methods following, that is to say:

Said defendants, throughout said period of time, were actively engaged in the conduct and management of the business and affairs of The Daniel Hayes Company, of Idaho, a corporation engaged in the business of buying and selling lands, theretofore organized and then existing under the laws of the State of Idaho, hereinafter referred to as corporation, and during said period of time acted in that behalf in the following capacities; that is to say:

Said Daniel Hayes was president, treasurer and a director;

Said John H. Rogers was vice-president, assistant to the secretary, and a director;

Said Oscar C. Lamp was vice-president, western manager, and a director;

Said Louis F. Courtner was secretary and attorney;

Said Leslie L. Palmer was agricultural director, western manager, western trustee, and a director;

Said Thomas J. Sefton was office manager;

Said Clyde L. Peck was financial agent;

Said Ralph W. West was a sales manager;

Said Charles E. Zimmerman was a general sales manager;

Said Matthew J. Bence was comptroller and a director;

Said Everett E. Harrison was assistant manager of the farming department and a director;

Said Edward G. Davis was a sales manager;

Said Stephen Lalor was a general sales agent;

Said Ben H. Brainerd was a general sales agent;

Said Charles F. Fries was a general sales agent;

Said William H. Fries was a general sales agent;

Said R. M. Anderson was western sales manager;
and

Said C. W. Porter was a general sales agent.

Said defendants were, according to said conspiracy, to devise a scheme and artifice to defraud a certain class of persons, to wit, all those persons, then residing in divers states of the United States at great distances from the State of California, who were desirous of purchasing for immediate use lands suitable for

agricultural purposes in said State of California, among whom were the persons hereinafter mentioned under the heading of "Overt Acts;" and said defendants, according to said conspiracy, were, for the purpose on their part of executing said scheme and artifice and attempting so to do, to insert in divers newspapers and other publications having a general circulation throughout the United States, divers advertisements, inciting the persons so to be defrauded to open correspondence with said defendants, under the name of The Daniel Hayes Company of Idaho, aforesaid, corporation as aforesaid, by means of the post office establishment of the United States, to take and receive from said post-office establishment, at Chicago aforesaid, a large number, to wit, one hundred, letters sent by those persons to said corporation in response to said advertisements, and to place, and cause to be placed, in the post-office of the United States at Chicago aforesaid, to be sent and delivered by said post-office establishment, a large number of letters, circulars, pamphlets, and advertisements, each addressed to one of the persons so to be defrauded, to wit, three hundred letters, three hundred circulars, one hundred pamphlets, and two hundred advertisements.

Said scheme and artifice then and there was to be and was a scheme and artifice to defraud said persons by inducing them, by means of representations and solicitations made to them by said defendants and by other agents of said corporation, and by means

of said letters, circulars, pamphlets, and advertisements, to send and pay their moneys, to give their promissory notes, and to transfer their real estate, Liberty bonds, and other valuable securities, to said defendants, under the name of said corporation, for purchasing from said corporation small parcels of land in said State of California, lying in two large contiguous tracts in Madera and Merced counties, called respectively the "Chowchilla Ranch" and the "Bliss Ranch," and together the "Twin-Profit Farms," each containing upwards of five thousand acres of land, by pretending to said persons in said representations, solicitations, letters, circulars, pamphlets and advertisements, that all the lands in said tracts were either fit for immediate cultivation and the raising of crops, to wit, of alfalfa, barley, oats, corn, beans and potatoes, and the growing of fruit trees, or capable of being easily put in condition for the immediate raising and growing of such crops and trees; notwithstanding the fact then was, as said defendants throughout the period of time aforesaid well knew, and as the grand jurors aforesaid, upon their oath aforesaid, charge that it then was, that only a small portion of said lands was then fit for, or capable of easily or ever being made suitable for raising such crops or growing such trees, because the greater portion of said lands then was, by reason of the presence of excessive natural deposits of alkali thereon and want of continuously-running streams and sufficient rainfall, entirely unfit for, and incapable by any prac-

licable means of being made suitable for, the raising or growing of such crops or trees, or any crops or trees whatever worth the expense of their sowing or planting.

The price of said parcels of land to each of such purchasers, including said unfit lands, was, according to said scheme and artifice, to be two hundred dollars per acre for each acre of said land in said tract, one half of which was to be paid to said corporation in each case either in cash, or in promissory notes, or in cash and promissory notes, or in cash, promissory notes, real estate and Liberty bonds, or other valuable securities, the remainder to be evidenced by a mortgage due in five years from the date of the purchase, which mortgage, said defendants, through said corporation, would pretend, to be persons purchasing said unfit lands, could be met through the sale of the crops to be raised upon said lands during said mortgage term.

And said defendants, according to said scheme and artifice, were to induce the persons to whom they were, by the means aforesaid, to sell parcels of such unfit land respectively to pay said corporation a sum of money, in most instances forty dollars per acre, for preparing their lands for cultivation and for sowing crops thereon, under the pretenses on the part of said defendants and corporation made to such purchasers that said lands of such purchasers would grow crops, and that such crops would be valuable and would produce such returns as to enable those persons to

meet their said mortgage obligations respectively through such returns; whereas in truth and in fact, as said defendants throughout said period of time well knew, no crops of any value exceeding a small fraction of the value of the moneys so paid for said purposes could ever be produced from said unfit lands so sold, or would ever be produced by any bona-fide effort of said defendants or of said corporation, it being a part of said scheme and artifice for said corporation and defendants to expend only a small portion of such moneys so paid to them in cultivating said unfit lands, and that merely for the purpose of concealing said deposits of alkali and the unfitness of said lands for agricultural purposes from the sight of such of said persons as should inspect their purchases of such unfit lands and of anyone who should inspect the same in their behalf.

Said defendants, after so securing the moneys and property of the person who should so purchase parcels of such unfit lands paid and transferred to said corporation as consideration for the purchase thereof, and said promissory notes so given as such consideration, and the moneys of such persons so paid to said corporation for preparing said unfit lands and sowing crops thereon, as aforesaid, and well knowing all the premises aforesaid, and, as aforesaid, the unfitness for the purposes aforesaid of the lands so to be sold to the persons so to be defrauded, and the fact that they were incapable of being made fit for those purposes, or of producing any valuable crops,

were, according to said scheme and artifice, to convert said moneys and property of said persons, and the proceeds arising from the discounting of such promissory notes of said persons, to the sole use of said defendants and of said corporation, without said defendants or said corporation rendering or giving to said persons any service or thing of value in return therefor, and so were to defraud said persons.

Overt Acts.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that certain of said defendants, at the times and place in that behalf hereinafter mentioned in connection with their names, and to effect the object of said unlawful and felonious conspiracy, combination, confederation and agreement, did do, among many others, certain acts; that is to say:

1. Said defendants, on April 29, 1918, at Chicago aforesaid, in said division and district, caused to be placed in the post-office of the United States there, to be sent and delivered by the post-office establishment of the United States, a certain circular then and there addressed to one Lewis W. Canby, at Winfield, Iowa, to wit, a circular of the tenor following:

1. Said defendants, on July 3, 1918 at Chicago aforesaid, in said division and district, caused to be placed in the post office of the United States there, to be sent and delivered by the post-office establishment of the United States, a certain circular then and there addressed to one Harriet C. Daly, at Marshalltown, Iowa, to wit, a circular of the tenor following:

THE DANIEL HAYES COMPANY

The National Farmland Corporation

More cultivated land is needed to bring an increase of food production. The dire necessities of the situation are evidenced by the food restrictions under which we all are living. Every man of us needs to co-operate to his level best with the Government.

The Daniel Hayes Company is doing its best in this spirit of cooperation to get new farms into the hands of those who will cultivate them. From this time forward it will concentrate its energies upon the sale and colonization of the farms of the famous Chowchilla estate in Madera and Merced Counties, in the San Joaquin Valley, of California.

The Chowchilla property embraces 108,000 acres on the east side of the San Joaquin river. It has vast possibilities for doing what the Government wants done. A few years ago it was found that the ranch was underlaid with strata of water-bearing gravel and that by putting down shallow wells an abundance of water could be had for irrigation. The water rises to within eleven feet of the surface and the short lift makes irrigation easy and economical.

Allowing forty acres to the farm, we shall have a total of 2,700 farms whose productive capacity is unexcelled. We are taking advantage of the almost universal desire of people some day to own a home in California. Now, there is a double reason for taking a farm and getting it into a state of productiveness. The profits of farming never were so

great as now and the Government never needed to have new farms under cultivation more than at the present moment.

The Chowchilla farms are attractive for many reasons. The city of Chowchilla is a young and growing municipality on the line of the Southern Pacific Railway, between Fresno and San Francisco. It has an attractive and modern hotel, beautiful school buildings, creamery and various business places. A paved boulevard twelve miles long extends from the city to the heart of the tract and a branch railroad parallels the boulevard and is some fourteen miles long.

A considerable number of farms have been sold and improved and their occupants are prosperous and delighted with the land. These farms are not experimental in any respect. The business of raising alfalfa is one of the most profitable, as it is cut five to eight times a season with an average cutting of about one and a half tons to the acre. The demand for alfalfa is such that the grower is seldom asked to take less than \$20.00 a ton, while it is much higher at the present time. Dairying has come in for a good deal of attention and the product is taken at the farmer's door at a profitable price. Those who wish to raise hogs, poultry and other live stock find here an opportunity that is not easily duplicated.

California is best known for its fruits and its climate. But California has all kinds of climate from the extreme of dryness in the southern and eastern part of the state to the extreme of humidity in the north-

western coast country. The San Joaquin Valley is visited by occasional rains during the winter months but irrigation is necessary for the successful raising of crops other than pasture.

Chowchilla is in the heart of the citrus fruit and grape country of the state. Fresno, a few miles to the southeast, is the chief raisin center of the world. Nearby are some of the largest orange groves in California. The Chowchilla lands are suited to growing oranges, lemons, grapes, peaches, figs, olives, pears, and in fact all the fruits of California.

The Daniel Hayes Company, however, realizes that these are crops for the specialist and that certainty of success is found in the growing of alfalfa, in dairying and general farming. We urge the raising of necessities now while we need to help feed our allies in the war.

With the unlimited supply of water for irrigation a succession of crops may be grown on the Chowchilla lands during the ten months' growing season. The company therefore recommends the sure money crops and *and* leaves to the specialist the more technical business of fruit growing, which often bring amazing returns under careful management and marketing.

We are having the cooperation of the Union Pacific and Southern Pacific Railroads' entire Colonization departments. Advertisements in the leading farm and general publications will reach many millions of readers. We suggest that you look for these an-

nouncements, as it is to be a thorough campaign of advertising for the Chowchilla farms.

THE DANIEL HAYES COMPANY

Daniel Hayes, President

Daniel Hayes Building
109 North Dearborn Street
CHICAGO . ILLINOIS

2. Said defendants, on August 3, 1918, at Chicago aforesaid, in said division and district, caused to be placed in the post office of the United States there, to be sent and delivered by the post-office establishment of the United States, a certain circular letter, then and there addressed to Louis Rohresen, at Tripoli, Iowa, to wit, a circular letter of the tenor following:

Established 1855 as C. G. Hayes & Bro.

THE DANIEL HAYES COMPANY

The National Farmland Corporation

The Daniel Hayes Building

109 North Dearborn Street

CHICAGO

August 2nd, 1918.

Dear Sir: -

Have YOU bought a Twenty Acre (or larger) Farm at Chowchilla, California, for yourself?

If you HAVEN'T done this by now, it's OUR fault. We haven't laid before you plainly enough - - convincingly enough, in full justice - - the GREAT, BIG, REAL truths about Chowchilla.

Of course you want to live in California some day. Any man would be foolish - - if he had the oppor-

tunity -- to refuse to enjoy this blessed climate and beautiful country where people live LONGER and HAPPIER.

By our plan you can go out there now, or later, just as you like. You can make the farm pay for itself before you pay for it.

You can start on convenient terms -- and, until the farm has paid for itself, we will crop it out, work it for you -- for a share of the profits.

You have heard and read about what Chowchilla offers. You have been interested in what we are doing at Chowchilla through your neighbors. We want you for one of our neighbors out at Chowchilla; many of us are going to have our own farms out Chowchilla way, you know.

Your friends from your own and other counties will be out there.

Get in on this Special Thirty Day Sale. Take my assurance that this property is wonderful -- that these pieces are among the finest. Get in quickly and take that wonderful trip of ours on our private train the first week in October -- SOME TRIP -- believe me!

I suggest that you talk with our man TO-DAY.

Yours very truly,

THE DANIEL HAYES COMPANY.

Daniel Hayes

President.

An Association of Men who have sold one million acres of farms, over half of which they have reclaimed by irrigation

3. Said defendants, on August 5, 1918, at Chicago aforesaid, in said division and district, caused to be placed in the post office of the United States there, to be sent and delivered by the post-office establishment of the United States, a certain other circular letter, then and there addressed to one Lewis W. Canby, at Winfield, Iowa, to wit, a circular letter of the tenor following:

THE DANIEL HAYES COMPANY

Chicago

U. S. A.

August 5th, 1918.

Dear Sir:-

SAY, DOGGONE IT, -- wouldn't it be fine if we had Forty Acres down here in Illinois or Iowa that we never had to put any fertilizer on, nor plow any crops under -- and where it rains every time you want it to, and stops every time you think dry weather is what you require?

You probably will say -- "There ain't no such animal". But this is exactly what the condition is at Chowchilla, California, where Daniel Hayes Salesmen are selling land on a plan where the farm pays for itself.

Your Father or Grandfather told you how it was in the pioneer days here in Illinois and Iowa. It was a tough job to break up ground and it took several years to make it profitable.

Do you realize that the Daniel Hayes Company will co-operate with you in putting your new land at Chowchilla to work, breaking it up and planting it, and that it pays from \$90 to \$150 per acre in the first crop of alfalfa?

Alfalfa, once planted, is good in California for eighteen years. We are sure of this because we have a stand of Alfalfa eighteen years old now, and it looks as if it was good for eighteen years more. And it is much better than it was five years ago.

You can slap a crop of sugar beets in and have it harvested by the first of July. Then put in corn, beans, or potatoes for a second crop and get more quantity and better quality than you can get right here at home; and better prices, too!

Honestly, how do you justify yourself for staying in Iowa or Illinois when you have Chowchilla staring you in the face -- the best climate in the world, too.

These Five Thousand Acres we are selling during this Thirty Day Drive are extra choice -- in fact the pick of the tract.

Five Thousand Acres is a very small allotment, only 250 twenty-acre plots. We have to supply our friends and customers all over Illinois and Iowa, you know -- a word to the wise.

If I were you I would get busy right on receipt of this letter, and learn from the local Daniel Hayes Man if any of these choice pieces are still left, because, I am telling you, I don't know of a farm opportunity equally good, and remember we prove this by putting

our own money with yours to make your farm pay.
It's time for ACTION now.

Yours very truly,
THE DANIEL HAYES COMPANY.
DANIEL HAYES

President.

P. S. John E. Newman, Food Commissioner of the State of Illinois, knows Chowchilla, and knows the Daniel Hayes Company. He spoke before the Daniel Hayes Sales Organization at the Hotel La Salle, July 22, 1918. Read his address enclosed.

4. Said defendants, on April 10. 1919, at Chicago aforesaid, in said division and district, caused to be placed in the post office of the United States there, to be sent and delivered by the post-office establishment of the United States, a certain other circular letter, then and there addressed to one Warren B. Wise, at Sheffield, Illinois, to wit, a circular letter of the tenor following:

Established 1855 as C. G. Hayes & Bro.
THE DANIEL HAYES COMPANY
The National Farming Corporation
The Daniel Hayes Building
109 North Dearborn Street
CHICAGO.

Dear Sir:

Your attention is called to our Greater Chowchilla advertising campaign just begun in the Chicago Tribune.

We started this on Sunday, April 6, 1919, with a two-page spread giving an introductory story about the Great Chowchilla and Bliss Ranchos and the plans for their extensive development.

This campaign already has aroused a wide-spread interest in the work The Daniel Hayes Company is doing with its California farms.

The Chicago Tribune with its Sunday circulation of nearly 800,000 reaches approximately four million people direct in their homes where family questions are discussed and where the subject of a farm and home at delightful Chowchilla naturally will receive attention.

This campaign will be continued indefinitely with a full page in each Sunday issue of the Tribune.

Look for the advertisement each Sunday.

This heavy newspaper advertising campaign is being supplemented by a mail campaign addressed to all who show an interest in the subject at Chowchilla. We have a large force of expert salesmen who are following up the work of the newspaper and other advertising closely.

We have a wonderful advantage at Chowchilla. California is one of the best organized states in the Union. All the communities are working well together. The people have remarkable initiative.

The climate is such that we are taking our purchasers to California any day in the year. There is no closed season for purchasers of Chowchilla farms any more than there is a closed season there for farm operations.

We have started in to make Chowchilla the most attractive agricultural and horticultural community in California. That is a big undertaking but we have the ground work well started. Be sure that you are the owner of a Chowchilla farm so as to be in line for all the benefits resulting from the great development.

The extensive advertising campaign is going well and as fast as we get the work satisfactorily under way in one city we shall establish offices and begin a similar advertising and sales campaign in another leading city.

Already Chowchilla is the most extensively advertised location in the United States. We expect to have every wide awake person in the country know about it and about the work of our organization.

THE DANIEL HAYES COMPANY.

An Association of men who have sold one million acres of farms, over half of which they have reclaimed by irrigation

5. Said Daniel Hayes, on April 18, 1919, at Chicago aforesaid, in said division and district, placed in the post office of the United States there, to be sent and delivered by the post-office establishment of the United States, a certain letter, then and there addressed to one H. J. Miller, at 329½ W. Wilson St., Madison, Wisconsin, to wit, a letter of the tenor following:

Established 1855 as C. G. Hayes & Bro.

THE DANIEL HAYES COMPANY

California Twin Profit Farms.

The Daniel Hayes Building

109 North Dearborn Street

Telephone Majestic 8640

CHICAGO

April 18, 1919.

Mr. H. J. Miller,
329½ W. Wilson St.,
Madison, Wisc.

Dear Sir: -

Your reply to our announcement in the Chicago Tribune has reached us before we had received our printed matter. A few days ago, the electrotypers went on a strike, and this has delayed us in securing our printing.

Within a few days, we shall be in position to mail to you our 48-page book, "TWIN-PROFIT FARMS." This book is beautifully illustrated and gives every detail of our offer.

This Company is now in its sixty-fourth year and during this long period we have never lost a dollar for a client who has followed our instructions. A generation ago, the Daniel Hayes Company sold Iowa land to farmers at \$10 to \$20 an acre -- land that is worth from \$200 to \$250 an acre today! The opportunity of purchasing good land at a low price is pretty nearly a thing of the past. There are few

sections on the American continent where it is possible to secure the right combination of agricultural conditions that will insure an unusual profit.

Our book tells a story of agricultural success, and this success is being experienced on this same land by HUNDREDS OF FAMILIES! Instead of attempting to describe the land and the profit assurances of our Twin-Profit Farms, we shall ask you to wait for our book. You can make your decision only when you have all the evidence.

When this printed matter is in your possession, you will be impressed by the fact that there is nothing experimental about these Twin-Profit Farms. The demonstrating has all been done.

In that book we shall place before you the testimony of many persons, the majority of whom are practical farmers. Their experience may be relied upon when it comes to deciding the value of land. We shall prove to you that every favorable condition fortifies your investment in one of these farms, and that you are not beset by any unfavorable conditions.

At the time we mail the book, we shall also write to you. We wish to place you in position where it will be possible for you to arrive at your decision, because our book will reveal the facts just as clearly as though you were to take a trip to California for the purpose of inspecting this land. When you do go out to inspect these Twin-Profit Farms, you will

find that our book has given you the whole truth and nothing but the truth.

Very sincerely yours,

DANIEL HAYES

President

THE DANIEL HAYES COMPANY

DH-AZ

6. Said Daniel Hayes, on November 4, 1918, at Chicago aforesaid, in said division and district, placed in the post office of the United States there, to be sent and delivered by the post-office establishment of the United States, a certain other circular letter, then and there addressed to one Wilbur B. Davis, at 207 Grove Street, Joliet, Illinois, to wit, a circular letter of the tenor following:

Established 1855 as C. G. Hayes & Bro.

THE DANIEL HAYES COMPANY

California Twin Profit Farms

The Daniel Hayes Building

109 North Dearborn Street

Telephone Majestic 8640

CHICAGO.

From Mr. Daniel Hayes,
President, The Daniel Hayes Co.,
Chicago, Illinois.

Dear Friend: -

You undoubtedly have read "Twin-Profit Farms", the illustrated 48-page book that I mailed to you in answer to your request for information.

The FACTS have been placed before you.

The experiences and opinions of many who have settled on these Twin-Profit Farm Lands at Chowchilla, Calif., have been given to you for your consideration.

The profit-possibilities -- backed by PROFIT EXPERIENCE of those who live on their Twin-Profit Farms -- have been explained to you.

How do you like the outlook for YOUR OWN PROFIT?

What should land be worth, under cultivation, that PAYS FOUR TIMES THE PROFIT of other land selling for the SAME price?

You pay no more for Twin-Profit farm land than you pay for Mid-western farm land -- but the Twin-Profit Farms have FOUR TIMES the profit capacity!

The Mid-western lands, at \$200 an acre, can not advance very much in price because they have reached the limit of their earning-possibilities.

The Chowchilla Twin-Profit Farms CAN and WILL increase in price, because their profit returns are so much greater than the returns realized on other farm land.

Here is an example in simple arithmetic:

The price of 80 acres of good Illinois or Iowa farm land, at \$200 an acre, is \$16,000.

The price of 20 acres of Chowchilla Twin-Profit farm land, at \$200 an acre, is \$4,000.

It is easier -- less work -- calls for less equipment -- to farm 20 acres than to farm 80 acres.

But - - your 20-acre Twin-Profit farm PAYS AS MUCH PROFIT as your 80-acre Mid-western farm.

If one farm pays 12- $\frac{1}{2}$ % on its value, yearly, and another 50% on its cost-price yearly, should the VALUE of the two farms remain the same?

If the 80-acre farm cost FOUR TIMES as much as the 20-acre farm, and yet PAYS NO MORE PROFIT, what should the 2-acre farm be worth, on an investment basis?

Among the 400 or more families who have settled on Twin-Profit Farm Lands, MOST of them are farmers from Iowa, Illinois and other Mid-western states.

When they say that Twin-Profit Farms pay FOUR TIMES the profit, for each acre, compared with Mid-western farm lands, they know what they are talking about!

How did this real opportunity go unnoticed all these years?

Merely because the Chowchilla Ranch and the Bliss Estate were employed as cattle ranches until recently. The West relinquishes its romantic traditions reluctantly. The West-that-was held to its cattle grazing in the open country. But the West-that-is, must heed the fact that railways, growing cities, beautiful motor-roads, factories, rapidly increasing population, are all demanding GREATER UTILITY of fertile land.

Breaking up and farming over 100,000 acres is not one man's job. It calls for ORGANIZED EFFORT!

The 400 or more families now working their Twin-Profit Farms at Chowchilla - - a farming population of

more than 2,000 in these few months - - PROVE that this is not a one-man job, or a one-organization job.

In recent months, we have broken, plowed and cropped THOUSANDS of acres for NON-RESIDENT purchasers - - who see in these Twin-Profit Farms the following very desirable investment elements:

SAFETY - - no danger of loss of the invested capital - - no danger of depreciation, because of the PRODUCTIVITY of this land, and because of the standing and experience of The Daniel Hayes Company, now in its sixty-fifth year of dealing in agricultural lands;

CO-OPERATION and SERVICE. The economy and the certainty of rapid progress made possible by the ORGANIZED EFFICIENCY of The Daniel Hayes Company. You are not left to your own resources; you are not simply sold a tract of land and forgotten. You become PART OF this great farming organization that breaks your land, irrigates it, crops it and farms it for five years - - or that permits you to move on your land AT ONCE if you are ready to start right in farming;

QUICK PROFITS - - no long, costly waits - - but the actual realization of profit beginning the second year;

THE PROTECTION OF EXPERIENCE! You are not asked to do the experimenting. Two thousand prosperous, happy, money-making persons are already settled on their Twin-Profit Farms - - and their ex-

perience has done all the PROVING you need as to the productivity of these farms and the dependability of The Daniel Hayes Company;

HIGH-CLASS LAND AT A NOMINAL PRICE -- not "bargain land" that is sold on a price basis, but QUALITY LAND sold on an honest basis of valuation. Never look at the price-tag on land, and think that there is nothing else to inspect. Get VALUE -- and never expect to fatten your purse later on by flattering your purse in the beginning;

CASH MARKETS for everything grown on your land -- the auction plan of selling, with the privilege of NOT making a sale if the bid-prices are not satisfactory;

ORGANIZED PRODUCTION -- with neighbors not trying to under-sell you, but working WITH YOU to keep up the prices!

Now, add to these Chowchilla Truths, these further important facts:

You have the most delightful climate on earth -- life in the San Joaquin Valley -- but in the most agreeable part of that valley, right opposite Pacheco Pass, with its tempering breezes from the ocean.

You do none of the pioneering. That has been done for you. You have the advantage of the highest-class transportation, the short distance to many good-sized towns and cities -- and the benefits of schools, churches and motor-roads, with the great Jesemite Valley but a few hours distant by automobile!

You are dealing with PROFIT FACTS whether you consider these Twin-Profit Farm Lands for residential purposes or non-resident profit-returns.

If we do the cropping for you, we divide the profit with you - - and we do this for five years. Your land has then been brought to a high state of productivity - - its value has increased greatly - - you have received large profits in the meanwhile.

You may then farm this land on your own account, or rent it to dairy farmers who will pay you MUCH MORE than the highest gross returns of Mid-western farm lands!

In just a few years - - even without going on this land and working it yourself - - you receive your original investment back, and continuously thereafter, you are reaping your PROFIT-HARVEST!

If you operate your Twin-Profit Farm, you may depend upon not less than \$100 an acre yearly - - and if you grow special crops, and set out an orchard, you will make much more. All the while, your TWIN-PROFIT FARM IS BECOMING MORE VALUABLE!

If we do the farming for you, your profits will amount to AT LEAST FOUR TIMES the returns your money would realize were it invested in first mortgages!

If you invest your money at 6%, you must wait 16-2/3 years before you have DOUBLED your principal.

If you are making 25% annually, YOUR MONEY COMES BACK TO YOU EVERY FOUR YEARS -- and its value does NOT remain stationary, as it would in a bond or a mortgage. Its value INCREASES!

To get your Twin-Profit Farm cropped AT ONCE, you pay one-half down, and advance \$40 an acre, which is returned to you with 6% interest. You advance that cropping money only ONCE -- not each year!

You give notes, secured by mortgages, and these amount to \$25 an acre payable in three years; \$25 an acre payable in four years; and \$50 an acre, payable in five years!

By making this kind of contract, YOU GET YOUR WATER-RIGHTS FREE!

If you wish to move on your land right away, you must supply your own well and pumping-plant, reservoir and ditches.

When we do the cropping, your half of the profits will help you pay the balance. Therefore, YOU DO NOT ACTUALLY ADVANCE, out of your own pocket, the full price of \$200 an acre. There is no reason why your actual investment should amount to more than your one-half payment of \$100 an acre; certainly not much more.

Consequently, under this co-operative plan, YOU ARE NOT ACTUALLY PAYING TWO HUNDRED DOLLARS AN ACRE for your Twin-Profit Farm!

But -- under cultivation, this farm will INCREASE IN VALUE, and soon become worth \$400 an acre!

You are making a nominal investment grow into great value.

HUNDREDS OF OTHERS KNOW THAT THIS IS TRUE, BECAUSE THIS IS THEIR EXPERIENCE OF THESE TWIN-PROFIT FARMS AT CHOWCHILLA, CALIFORNIA!

You get the SAME LAND VALUE that these people got - - the SAME co-operation - - the SAME honest treatment.

They did not get the "cream." We are selling the CREAM, because we are selling land of EQUAL value in soil quality and location!

It is to OUR interest to see that you have as good a farm as any other purchaser, because OUR success must be based on YOUR success. Just as the experience of PRESENT settlers and non-resident buyers is an inducement to YOU, so will YOUR success be the same kind of inducement to others!

If you had no better evidence of the truth of these statements than the testimony of settlers on these Twin-Profit Farms, that would be sufficiently good evidence to justify you to make your investment AT ONCE!

However, if all that we have told you is FACT, then we should be willing to fortify that fact by a REFUND GUARANTEE!

We do this NOT because we take for granted that you doubt us, but because it is good business practice to promise only what can be lived up to.

Buying land is SERIOUS to you, and we make it just as serious a matter with ourselves.

WE GUARANTEE that if you will go to Chowchilla, and inspect your land after you have paid down the one-half of the purchase price or made a first payment of \$500 (the balance of the half-payment to be made at the rate of \$50 a month - - on each 20 acres), and you find this land other than we have represented to you in our book, "Twin-Profit Farms," we will REFUND ALL THE MONEY YOU HAVE PAID, AND PRESENT YOU WITH YOUR RAILWAY AND PULLMAN FARE BOTH WAYS!

You will be *out* guest at our expense for three days, at the beautiful, modern Chowchilla Hotel.

You will be given a pass that entitles you to go over the Chowchilla Ranch and Bliss Estate in company with a representative of this organization.

You may arrange to go on one of our regular Profit-Investigation Trips, or go independently - - but if you go alone, be sure to get the pass from us first.

Whether you intend to make California your home, or live where you are today, the bed-rock merits of this investment must appeal to you.

We succeed through co-operating with MANY.

YOU get the cumulative benefit of ALL of that co-operation!

Getting others to buy - - selling this land rapidly - - we are INCREASING THE VALUE OF YOUR TWIN-PROFIT FARM through this surrounding cultivation.

This work of ours adds profit to you WITHOUT YOUR OWN EFFORTS!

On an investment basis, you may wish 20, 40, 60, 80, 100, 120, 140, 160, 180, 200 or more acres.

You pay the SAME no matter how large a tract you buy.

You pay just as much an acre for 640 acres as you would pay for each of 20 acres.

I have done everything to make this story complete. I can guarantee you all but this one essential point!

I can NOT guarantee that we can hold the price of these Twin-Profit Farm Lands at the present price.

How many acres can you handle - - NOW?

Very sincerely yours,

Daniel Hayes

President

THE DANIEL HAYES COMPANY

DH-CZ4

7. Said Thomas J. Sefton, on January 16, 1919, at Chicago aforesaid, in said division and district, placed in the post office of the United States there, to be sent and delivered by the post-office establishment of the United States, a certain letter, then and there addressed to one T. W. Willey, at Pipestone, Minnesota, to wit, a letter of the tenor following:

Established 1855 as C. G. Hayes & Bro.
THE DANIEL HAYES COMPANY
The National Farming Corporation
THE DANIEL HAYES BUILDING
109 North Dearborn Street
CHICAGO

January
16th,
1919.

Mr. T. E. Willey,
Pipestone, Minn.
R. F. D. 6.

Dear Sir:

In reply to your request we are enclosing descriptive literature of our California property.

This *aldn* sells for \$200.00 per acre - 50 percent of the purchase price being paid in cash and the balance secured by a mortgage running for five years at six percent.

In many instances the property is purchased for investment and is farmed by this Company on a fifty percent crop sharing basis. When this is done, the cost of plowing, subsoiling, levelling, seeding, drilling the well and installing pump and motor, and checking the land for irrigation, is paid, one half by the purchaser and one half by this Company. We estimate this cost to be \$80.00 per acre.

Our Messrs. Colby and Vaughan will be in Pipestone in the very near future and we have requested them to call and explain the matter to you in detail.

Very truly yours,

THE DANIEL HAYES COMPANY

By T. J. Sefton

TJS:RM

An Association of Men who have sold one million acres of farms, over half of which they have reclaimed by irrigation.

8. Said Louis J. Courtner, on September 4, 1919, at Chicago aforesaid, in said division and district, placed in the post office of the United States there, to be sent and delivered by the post-office establishment of the United States, a certain letter, then and there addressed to one L. G. Richardson, at Taylorville, Illinois, to wit, a letter of the tenor following:

Established as C. G. Hayes & Bro. 1855

THE DANIEL HAYES COMPANY

The Daniel Hayes Building

109 North Dearborn Street

CHICAGO September 4, 1919.

Mr. L. G. Richardson,

R.F.D. #3, Taylorville, Ill.

Dear Sir:

We were not a little surprised to receive your letter dated, Chowchilla, California, August 28, 1919, to the effect that you were not satisfied with your purchase of forty acres at Chowchilla, California, and that you desire to cancel the contract.

You will be interested to know that we have sold over ten thousand acres to Iowa farmers and other investors, and over six thousand acres to farm investors in Illinois, and from a half section to a section or more in a dozen different Central and Southern states, during the past year. All these buyers have personally inspected their land, and were not only satisfied, but accepted same, and in many instances increased their original purchases.

You do not give us any reason for requesting cancellation, and in fairness to us, we would appreciate your telling us just why you were not satisfied with the land so that we shall know what the difficulty was and can be guided accordingly in the future.

With the present improvements, and the cultivation of this land by us this fall, there is no question but what this land will bring \$300.00 an acre within the next few years, and at least \$400.00 within five years.

There is no reason why returns from this property should not be sufficient to give you all your money back within the next three or four years, and after that provide a nice income for life.

Already the value of the land has increased since we have taken hold of the properties and made sales and improvements. You must not overlook the fact that it is not raw land alone that you are buying, but land which is to be put into cultivation the first ensuing season after you purchase it, which means that there is only one season between the unimproved and the improved land in order to give you the benefit of the enhanced value due to such improvement. Where can you find such an investment which will bring you such satisfactory returns as our proposition?

Please let us hear from you.

Yours very truly,

THE DANIEL HAYES COMPANY,

By Louis F. Courtner,

LFC:m

Secretary.

9. Said Matthew J. Bence, on September 25, 1919, at Chicago aforesaid, in said division and district, placed in the post office of the United States there, to be sent and delivered by the post-office establishment of the United States, a certain letter, then and there addressed to one Daniel Fagan, at Dubuque, Iowa, to wit, a letter of the tenor following:

Established as C. G. Hayes & Bro. 1855

THE DANIEL HAYES COMPANY

The Daniel Hayes Building

109 North Dearborn Street

CHICAGO

September 25th, 1919.

Mr. Daniel Fagan,

Dubuque,

Iowa.

Dear Mr. Fagan: —

In order to start the work of cropping your land which you have recently purchased from this company, we are taking the liberty, as per the cropping agreement you signed, to draw on you on the basis of \$10 per acre on each acre purchased. We trust you will meet this sight draft promptly so that the work will not be delayed.

The farming of the Chowchilla land we sell is under the personal supervision of Mr. L. L. Palmer. Mr. Palmer is a graduate of Washington Agricultural College. He is one of the ten American members of the London Agricultural Society. Prior to joining us he was manager of Lord Aberdeen's 26,000 acre farm in

Canada. We consider Mr. Palmer one of the best men we can employ.

Mr. Palmer has just informed us it is now time to start fall operations. Therefore we trust this draft will receive your early attention.

Yours very truly,

THE DANIEL HAYES COMPANY,

By M J Bence

10. Said Oscar C. Lamp, on January 27, 1919, at Chicago aforesaid, in said division and district, placed in the post office of the United States there, to be sent and delivered by the post-office establishment of the United States, a certain letter, then and there addressed to one Charles Schnoor, at Primghar, Iowa, to wit, a letter of the tenor following:

Established 1855 as C. G. Hayes & Bro.

THE DANIEL HAYES COMPANY

The National Farming Corporation

The Daniel Hayes Building

109 North Dearborn Street

CHICAGO

January 24th, 1919.

Mr. Charles Schnoor,
Primghar, Ia.

Dear Sir:

We take great pleasure in advising you that the farm work at Chowchilla is moving along very rapidly. You will note from the enclosed telegram received from L. L. Palmer, our agricultural director, that we have plowed and leveled 13,000 acres and have completed

seeding 8,500. We are operating 13 seventy-five horse power Holt Caterpillar Tractors day and night and all seeding will soon be completed. The farm purchased by you is included in the above acreage.

Prior to this we have not called upon you for any payment on account of your cropping agreement, but it is now necessary to do so. We are, therefore, giving you the customary ten days' notice that a draft will be presented thru your bank for \$10.00 per acre for land which you purchased, this being one-fourth of your share of the cost of the farm work performed.

With best wishes, we are

Yours very truly,

THE DANIEL HAYES COMPANY,

BY Oscar C Lamp

P. S. You will be interested in reading the attached telegrams received from practical farmers and bankers who have purchased and inspected their Chowchilla farms.

An Association of Men Who have sold one million acres of farms, over half of which they have reclaimed by irrigation

11. Said Everett E. Harrison, on February 8, 1919, at Chicago aforesaid, in said division and district, placed in the post office of the United States there, to be sent and delivered by the post-office establishment of the United States, a certain letter, then and there addressed to one M. W. Houser, at Cedar Rapids, Iowa, to wit, a letter of the tenor following:

Correspondence should be addressed to the company and not to individuals

Established as C. G. Hayes & Bro. 1855

THE DANIEL HAYES COMPANY

The National Farming Corporation

The Daniel Hayes Building

109 North Dearborn Street

CHICAGO February 8, 1919.

Mr. M. W. Houser,

320 Second Ave.,

Cedar Rapids, Iowa.

Dear Sir:

The nature of our farming operation in California is such that it will be impossible for us to accept anything but cash in payment of cropping agreements. Up to February 15th we will accept stock in payment of land, but I know of no case where we have accepted stock in payment of cropping agreements.

Your letter of the 30th came in just in time for me to rescue a draft that was just going out and I have been holding this to send direct to you as you request.

We regret Mr. Houser that we are unable to make this trade with you and if you could realize the amount of expenditures that we are making in developing this land I think you would appreciate our attitude.

Yours very truly,

THE DANIEL HAYES COMPANY

BY E. E. Harrison

EEH-HA.

12. Said Charles E. Zimmerman, on November 20, 1919, at Chicago aforesaid, in said division and district, placed in the post office of the United States

there, to be sent and delivered by the post-office establishment of the United States, a certain letter, then and there addressed to one Mrs. Lillian M. Pierce, at Red Key, Indiana, to wit, a letter of the tenor following:

Established as C. G. Hayes & Bro. 1855

THE DANIEL HAYES COMPANY

The Daniel Hayes Building

109 North Dearborn Street

CHICAGO

All correspondence should be addressed
to the Company and not to individuals

November 20th, 1919.

Mrs. Lillian M. Pierce,
Red Key, Indiana.

Dear Mrs. Pierce:

Your favor of the 18th has been referred to the writer for attention.

The letter which you received from the Daniel Hayes Company should not have been sent you. This letter was meant for some of the people who had been connected with the company in the past and whose connection had been severed by the company, giving them a statement of facts showing why the action had been taken.

I assure you that the company is in better shape today than it has ever been. We have ten tractors at work at the present time and all development is going ahead at a rapid rate and this development will be greatly increased from time to time.

The deed to your purchase will be ready in the very near future, as we are in position to make up all deeds promptly. The delay in this case has been occasioned by the fact that we are merely waiting for a recorded map from California.

The California real estate laws provide that the plat of a property must be recorded in the local county recorder's office before deeds are issued. Sometimes it requires a little time to get the plat of land made a matter of record. There is absolutely no cause for worry on your part in the matter.

I wish to assure you of our very hearty appreciation of your kindness in co-operating with us in interesting people in Chowchilla. No doubt, we will be in a position in years to come, to reciprocate your favors in a great many ways and it will always be a pleasure for us to do so.

With best wishes and kindest regards, I am,

Most sincerely yours,

THE DANIEL HAYES COMPANY

C. E. Zimmerman, General Sales Mgr.

CEZ*M

CONCLUSION.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said defendants, continuously throughout the period of time, at the place, and in manner and form, aforesaid, unlawfully and feloniously did conspire to commit offenses against the United States and certain of said defendants did do acts to effect the object of the conspiracy: Against the peace

and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

SECOND COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants, named in the first count of this indictment, on January 1, 1918, at Chicago aforesaid in said Eastern Division of said Northern District of Illinois, did devise the scheme and artifice to defraud, described in said first count, by the means and methods in that count set forth, and, afterwards, to wit, on July 3, 1918, for the purpose of executing said scheme and artifice, unlawfully and feloniously did place in the post-office of the United States there, to be sent and delivered by the post-office establishment of the United States to the person to whom it was addressed, a certain circular, to-wit, the circular set forth according to its tenor in overt act No. 1, under the heading "Overt Acts" in said first count, which was then and there addressed to Harriet C. Daly, at Marshalltown, Iowa; and that said Harriet C. Daly then was a person belonging to the class of persons to be defrauded in said first count described: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

THIRD COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants, named in the first count of this indictment, on January

1, 1918, at Chicago aforesaid in said Eastern Division of said Northern District of Illinois, did devise the scheme and artifice to defraud, described in said first count, by the means and methods in that count set forth, and, afterwards, to wit, on August 3, 1918, for the purpose of executing said scheme and artifice, unlawfully and feloniously did place in the post-office of the United States there, to be sent and delivered by the post-office establishment of the United States to the person to whom it was addressed, a certain circular letter, to wit, the circular letter set forth according to its tenor in overt act No. 2, under the heading "Overt Acts" in said first count, which was then and there addressed to Louis Rohrssen, at Tripoli, Iowa; and that said Louis Rohrssen then was a person belonging to the class of persons to be defrauded in said first count described: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

FOURTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants, named in the first count of this indictment, on January 1, 1918, at Chicago aforesaid in said Eastern Division of said Northern District of Illinois, did devise the scheme and artifice to defraud, described in said first count, by the means and methods in that count set forth, and, afterwards, to wit, on August 5, 1918, for the purpose of executing said scheme and artifice, unlawfully and feloniously did place in the post-office of

the United States there, to be sent and delivered by the post-office establishment of the United States to the person to whom it was addressed, a certain other circular letter, to wit, the circular letter set forth according to its tenor in overt act No. 3, under the heading "Overt Acts" in said first count, which was then and there addressed to Lewis W. Canby, at Winfield, Iowa; and that said Lewis W. Canby then was a person belonging to the class of persons to be defrauded in said first count described: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

FIFTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants, named in the first count of this indictment, on January 1, 1918, at Chicago aforesaid in said Eastern Division of said Northern District of Illinois, did devise the scheme and artifice to defraud, described in said first count, by the means and methods in that count set forth, and, afterwards, to wit, on April 10, 1919, for the purpose of executing said scheme and artifice, unlawfully and feloniously did place in the post-office of the United States there, to be sent and delivered by the post-office establishment of the United States to the person to whom it was addressed, a certain other circular letter, to wit, the circular letter set forth according to its tenor in overt act No. 4, under the heading "Overt Acts" in said first count, which was then and there addressed to Warren B. Wise, at Sheffield,

Illinois; and that said Warren B. Wise then was a person belonging to the class of persons to be defrauded in said first count described: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

SIXTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants, named in the first count of this indictment, on January 1, 1918, at Chicago aforesaid in said Eastern Division of said Northern District of Illinois, did devise the scheme and artifice to defraud, described in said first count, by the means and methods in that count set forth, and, afterwards, to wit, on April 18, 1918, for the purpose of executing said scheme and artifice, unlawfully and feloniously did cause to be placed in the post-office of the United States there, to be sent and delivered by the post-office establishment of the United States to the person to whom it was addressed, a certain letter, to wit, the letter set forth according to its tenor in overt act No. 5, under the heading "Overt Acts" in said first count, which was then and there addressed to H. J. Miller, at Madison, Wisconsin; and that said H. J. Miller then was a person belonging to the class of persons to be defrauded in said first count described: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

SEVENTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants, named in the first count of this indictment, on January 1, 1918, at Chicago aforesaid in said Eastern Division of said Northern District of Illinois, did devise the scheme and artifice to defraud, described in said first count, by the means and methods in that count set forth, and, afterwards, to wit, on November 4, 1918, for the purpose of executing said scheme and artifice, unlawfully and feloniously did cause to be placed in the post-office of the United States there, to be sent and delivered by the post-office establishment of the United States to the person to whom it was addressed, a certain other circular letter, to wit, the circular letter set forth according to its tenor in overt act No. 6, under the heading "Overt Acts" in said first count, which was then and there addressed to Wilbur B. Davis, at Joliet, Illinois; and that said Wilbur B. Davis then was a person belonging to the class of persons to be defrauded in said first count described: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

EIGHTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants, named in the first count of this indictment, on January 1, 1918, at Chicago aforesaid in said Eastern Division of said Northern District of Illinois, did devise the scheme and artifice to defraud, described in said first

count, by the means and methods in that count set forth, and, afterwards, to wit, on January 16, 1919, for the purpose of executing said scheme and artifice, unlawfully and feloniously did cause to be placed in the post-office of the United States there, to be sent and delivered by the post-office establishment of the United States to the person to whom it was addressed, a certain other letter, to wit, the letter set forth according to its tenor in overt act No. 7, under the heading "Overt Acts" in said first count, which was then and there addressed to T. W. Willey, at Pipestone, Minnesota; and that said T. W. Willey then was a person belonging to the class of persons to be defrauded in said first count described: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

NINTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants, named in the first count of this indictment, on January 1, 1918, at Chicago aforesaid in said Eastern Division of said Northern District of Illinois, did devise the scheme and artifice to defraud, described in said first count, by the means and methods in that count set forth, and, afterwards, to wit, on September 4, 1919, for the purpose of executing said scheme and artifice, unlawfully and feloniously did cause to be placed in the post-office of the United States there, to be sent and delivered by the post-office establishment of the United States to the person to whom it was addressed,

a certain other letter, to wit, the letter set forth according to its tenor in overt act No. 8, under the heading "Overt Acts" in said first count, which was then and there addressed to L. G. Richardson, at Taylorville, Illinois; and that said L. G. Richardson then was a person belonging to the class of persons to be defrauded in said first count described: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

TENTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants, named in the first count of this indictment, on January 1, 1918, at Chicago aforesaid in said Eastern Division of said Northern District of Illinois, did devise the scheme and artifice to defraud, described in said first count, by the means and methods in that count set forth, and, afterwards, to wit, on September 25, 1919, for the purpose of executing said scheme and artifice, unlawfully and feloniously did cause to be placed in the post-office of the United States there, to be sent and delivered by the post-office establishment of the United States to the person to whom it was addressed, a certain other letter, to wit, the letter set forth according to its tenor in overt act No. 9, under the heading "Overt Acts" in said first count, which was then and there addressed to Daniel Fagan, at Dubuque, Iowa; and that said Daniel Fagan then was a person belonging to said class of persons to be defrauded in said

first count described: Against the peace and dignity of the United States, and contrary to the form or the statute of the same in such case made and provided.

ELEVENTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants, named in the first count of this indictment, on January 1, 1918, at Chicago aforesaid in said Eastern Division of said Northern District of Illinois, did devise the scheme and artifice to defraud, described in said first count, by the means and methods in that count set forth, and, afterwards, to wit, on January 27, 1919, for the purpose of executing said scheme and artifice, unlawfully and feloniously did cause to be placed in the post-office of the United States there, to be sent and delivered by the post-office establishment of the United States to the person to whom it was addressed, a certain other letter, to wit, the letter set forth according to its tenor in overt act No. 10, under the heading "Overt Acts" in said first count, which was then and there addressed to Charles Schnoor, at Primghar, Iowa; and that said Charles Schnoor then was a person belonging to said class of persons to be defrauded in said first count described: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

TWELFTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants,

named in the first count of this indictment, on January 1, 1918, at Chicago aforesaid in said Eastern Division of said Northern District of Illinois, did devise the scheme and artifice to defraud, described in said first count, by the means and methods in that count set forth, and, afterwards, to wit, on February 8, 1919, for the purpose of executing said scheme and artifice, unlawfully and feloniously did cause to be placed in the post-office of the United States there, to be sent and delivered by the post-office establishment of the United States to the person to whom it was addressed, a certain other letter, to wit, the letter set forth according to its tenor in overt act No. 11, under the heading "Overt Acts" in said first count, which was then and there addressed to M. W. Houser, at Cedar Rapids, Iowa; and that said M. W. Houser then was a person belonging to said class of persons to be defrauded in said first count described: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

THIRTEENTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants, named in the first count of this indictment, on January 1, 1918, at Chicago aforesaid in said Eastern Division of said Northern District of Illinois, did devise the scheme and artifice to defraud, described in said first count, by the means and methods in that count set forth, and, afterwards, to wit, on November 20, 1919,

for the purpose of executing said scheme and artifice, unlawfully and feloniously did cause to be placed in the post-office of the United States there, to be sent and delivered by the post-office establishment of the United States to the person to whom it was addressed, a certain other letter, to wit, the letter set forth according to its tenor in overt act No. 12, under the heading "Overt Acts" in said first count, which was then and there addressed to Mrs. Lillian M. Pierce, at Red Key, Indiana; and that said Mrs. Lillian M. Pierce then was a person belonging to said class of persons to be defrauded in said first count described: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Charles F. Clyne

United States Attorney.

[Endorsed]: No. 7303. UNITED STATES DISTRICT COURT, NORTHERN *District of* ILLINOIS EASTERN *Division*. THE UNITED STATES OF AMERICA *vs.* DANIEL HAYES, JOHN H. ROGERS, OSCAR C. LAMP, LOUIS F. COURTNER, LESLIE L. PALMER, THOMAS J. SEFTON, CLYDE L. PECK, RALPH W. WEST, CHARLES E. ZIMMERMAN, MATTHEW J. BENCE, EVERETT E. HARRISON, EDWARD G. DAVIS, STEPHEN LALOR, BEN. H. BRAINERD, CHARLES F. FRIES, WILLIAM H. FRIES, R. M. ANDERSON and C. W. PORTER. INDICTMENT Vio. Sec. 37, C. C. Conspiracy to commit postal of-

fences; and Sec. 215, C. C. Using U. S. mails to defraud. POSTAL LAWS. *A true bill*, George Atkinson, *Foreman*. Filed in open court this.....day of OCT 28 1920, *A. D.* 19 John H. R. Jamar Clerk.

The President of the United States of America,
To the Marshal of the Northern District of Illinois,
Greeting:

You are hereby commanded that you take Chas. F. Fries if he shall be found in your district, and him safely keep, so that you have his body forthwith before the Judge of the District Court of the said United States for the Northern District of Illinois, at Chicago, in the Eastern Division of said District, to answer unto THE SAID UNITED STATES in an indictment pending in the said Court against him for Viol. Sec. 37. C. C.—conspiracy to commit postal offenses, and Section 215-C. C. Using U. S. Mails to defraud Postal Laws. *And have you then and there this writ, with your return hereon.*

Witness, the Hon. Kenesaw M. Landis
Judge of the District Court of the United
States of America, for the Northern District
(Seal) of Illinois, at Chicago, aforesaid, this 7th day
of December in the year of our Lord, nineteen
hundred and twenty, and in the 145th
year of the Independence of the said United
States.

John H. R. Jamar Clerk.

I return this warrant unexecuted, not having been able to find the within name Chas. F. Fries within my district, this 8th day of December A. D. 1920.

John J. Bradley, United States Marshal

By T. C. Smith Deputy

[Endorsed:] No. 7303. District Court of the United States, NORTHERN DISTRICT OF ILLINOIS UNITED STATES OF AMERICA, vs. John Hayes et al. BENCH WARRANT *Returnable forthwith.* John H. R. Jamar *Clerk.* *Returned and filed this 8th day of December A. D. 1920.* John H. R. Jamar *Clerk.*

In the United States District Court,
FOR NORTHERN DISTRICT OF ILLINOIS,
Eastern Division.

I, John H. R. Jamar, Clerk of the District Court of the United States of America, for the Northern District of Illinois, DO HEREBY CERTIFY the above and foregoing to be a true and correct copy of Indictment and bench warrant U. S. vs. Chas. F. Fries, et al. #7303. as same appears from the original filed in said Court on the 28th & 8th day of October & December A. D. 1920, and now remaining in my custody and control.

In Testimony Whereof, *I have hereunto set my hand and affixed the seal of said Court*
(Seal) *at my office in Chicago, in said District this 13th day of October A. D. 1921.*

John H. R. Jamar

Clerk.

(Testimony of Charles F. Fries.)

It is stipulated that the Charles F. Fries mentioned in the indictment is the Charles F. Fries before the Court.

MR. MOODY: I object to the introduction of any testimony on the ground that the indictment does not state a cause of action, and move to dismiss on that ground.

Motion denied.

CHARLES F. FRIES, the defendant, called on his own behalf, sworn, testified as follows:

DIRECT EXAMINATION.

I am 43 years of age and resided at St Paul, Minnesota some ten years previous to 1920. Prior to the time alleged in the indictment as the beginning of the conspiracy, to-wit, January first, 1918, I was State Manager of a life insurance company of New York for the State of Minnesota. While I was such agent I did not know any of the following named personally:

Oscar C. Lamp, Louis F. Courtner, Leslie L. Palmer, Thomas J. Sefton, Clyde L. Peck, Ralph W. West, Charles E. Zimmerman, Matthew J. Bence, Everett E. Harrison, Edward G. Davis, Stephen Lalor, Ben H. Brainerd, R. M. Anderson, or C. W. porter. I did of course, know my brother, William F. Fries.

I met Daniel Hays first in January, 1918, at Rock Island, Illinois. I met him through one Silas Perkins, who was in his employ as an agent. Silas Perkins had formerly worked in the insurance company with me. He told me he was selling stock in the Daniel Hays Company; that the stock was easy to sell for the

(Testimony of Charles F. Fries.)

reason it was guaranteed by a mortgage bond, in other words, a first mortgage placed with the Title and Trust Company which in turn authenticated the stock as it was sold. He told me there was a chance to get a contract with 15 per cent commission for selling the stock and that is what prompted me to go down to Rock Island to see about it. I did not make an appointment with him but went down to where Mr Perkins was at Waterloo. Mr Perkins told me to go right down and I would be put to work there. When I got there I was told by the District Manager, Mr. John Day, that it was necessary for me first to go to Rock Island to meet Mr Hays and get my qualifications as a salesman. Rock Island was the home office of the Daniel Hays Company. At that place I saw Mr Thomas J. Sefton. I think I met Mr Hays for just a moment in passing through the office. Mr. Sefton told me that they were placing this stock in different districts, 500 shares in each district, with the idea of of afterward putting on a land campaign. They told me at that time of lots of work the Hays Company had done in Twin Falls, Idaho. He did not say where the land would be located they were going to sell. He said they had put Twin Falls on the map. He said the preferred stock guaranteed 8 per cent; that they had previously paid an extra 12 per cent in addition before I went to work for them, making a dividend of 20 per cent on their stock. He said it was a cash

(Testimony of Charles F. Fries.)

dividend. The par value of the stock was \$10.00 a share. Sefton said the stock was to be sold at that time for \$12.50 a share.

At the time I saw Mr Sefton I entered into a contract with the Hays Company for the sale of their stock. I cannot remember whether it was a written contract or a memorandum contract. I reported directly to the office on most of my sales. The office furnished me with a prospectus and an official statement as to the assets and liabilities.

Witness identifies statement as having been shown to him at that time, said statement being marked Defendant's "Exhibit No. 1."

MR. MOODY: For the purpose of the record I will state that this shows the assets and liabilities of the company as \$1,660,031.64 at the time the report was made.

I started to sell stock out of Waterloo, Iowa. I was furnished with a list of the Iowa stockholders in the company for the purpose of showing prospective customers who the stockholders were.

(List of stockholders identified by the witness as being the list above mentioned, offered in evidence and received as Defendant's Exhibit No. 2.)

During the time I was selling stock there was submitted to me a general list of the stockholders of the Daniel Hayes Company. I ceased selling stock in June, 1918.

(Testimony of Charles F. Fries.)

(List of stockholders offered and received as Defendant's Exhibit No. 3.)

My first contract was for 15 per cent commission on the sale prices. That contract was reduced to writing.

Q Now I will show you a book which I will call Defendant's Exhibit 4 for identification.

MR MOODY: I do not desire to put it all in at one time, but there are certain conditions I will call attention to that were put in at the time the land campaign was started. All of these pictures were put in at the time the land campaign was started. This is a copy of the statement that was in the prospectus.

(The Witness) Exclusive of the photographs of Chowchilla and of my letters bearing date later than January 1, 1918, the rest of the book was furnished as a part of the salesman's kit by the Hayes Company to show prospective customers for sales of stock. The pictures of Chowchilla and the letters were added at the time the land campaign was started. They were added by the company and the pictures and letters were furnished by the company.

(Said book offered as Defendant's Exhibit No. 4 and received in evidence.)

The first picture in the book was of Mr. Perrine. I was told by Mr Hayes that he had done great things in the West in connection with the development of Twin Falls and adjacent Idaho territory. The second picture is that of Daniel Hayes, Sr. I was told that

(Testimony of Charles F. Fries.)

he has a wonderful record as to his honesty and integrity in the land business; that he had done great things in the West and in and around Rock Island in the way of development of land. He had just retired and I understood his son, Dan Hayes Jr. had become president.

The next picture is of Daniel Hayes Jr., president of the Hayes Company. The next picture is that of the Daniel Hayes Building at 109 North Dearborn Street, Chicago. Their office was moved there in the spring or early summer of 1918. I was first informed by Mr Sefton that the building was the property of the Daniel Hayes Company, I was afterward informed that it was under a long lease. I obtained the latter information perhaps around the first of 1919. That was explained to me by Mr John H. Rogers, Vice President of the company. He was also the company's counsel. I understood that he had been a judge in South Dakota. When the company moved into this building they occupied the second floor and part of the other floors. I never saw any other name on the building except the Daniel Hayes Company.

I had many conversations in connection with the brief statements of these sketches of the individuals contained in this exhibit through the course of my employment with the officers of the company. I never made any investigation on the outside but accepted them as facts.

(Testimony of Charles F. Fries.)

It is stipulated that at the time referred to by the witness the Chicago Herald maintained a department known as "The Bureau of Agriculture and Industry".

Letter of March 26, 1916 read, said letter being a part of Defendant's Exhibit 4.

(The Witness) After I was supplied with this book I did not hear any of these sentiments expressed in the letters just read controverted or any criticisms of the Daniel Hayes Company and its methods up to the time of the complaint of E. M. Ward. During all the period up to that time I presented these letters and facts to prospective customers both for land and stock. This letter which is handed me purporting to be from the president of the Daniel Hayes Company of Idaho dated March 4, 1918, was given me by an officer of the Company to be shown to any one that would be interested, a prospective customer for stock or land.

Said document offered and received as Defendant's Exhibit No. 5.

Witness identifies by-laws of the Hayes Co. furnished to him by officers of the Company, offered and received as Defendant's Exhibit No. 6. Exhibit 6 read.

Witness identifies a written contract dated May, 1918, for selling stock in the Daniel Gayes Co., said contract being between the witness and Daniel Hayes Co., offered and received as Defendant's Exhibit 7.

MR. MOODY: I do not desire to take up the time of the Commissioner to read this. The sole

(Testimony of Charles F. Fries.)

purpose in introducing it is to show the manner in which this man became connected with the Daniel Hayes Company and the fact that he was treated on the same terms, as an employe, as in other contracts.

Who, if anyone, connected with the Daniel Hayes Company told you about the land campaign?

A Mr. Daniel Hayes, Jr.; Mr Thomas T. Sefton, who was at that time sales manager; Mr John H. Rogers, the vice-president; Mr. Mark Bennett, who was supposed to be an engineer and soil expert; and there are others whose names I do not recall.

(THE WITNESS) The land was situated in and around Chowchilla California. They represented they had 108,000 acres for sale. They said this land was 100 per cent land, good land, and would raise alfalfa. They showed me an engineer's report --- Mr I. U. McPherson ---which I carried but which I have lost in some way.

MR MOODY: Have you that report of Mr McPherson's?

MR WEISL: I don't think we have it here.

(THE WITNESS) They had parties there who gave me personal assurances, Mr Mark A. Bennett in particular. He claimed to have been over the tract and knew all about it. I had never been in California prior to that. I also talked with Mr E. H. McElroy. He said he had been over the ranch and said it was elegant land, a great climate, and so forth. I talked

(Testimony of Charles F. Fries.)

with a man by the name of W. L. Fry from Waterloo, Iowa. I had sold him stock in the Company. He lived at Aurora, Iowa. I told him I was the last man selling stock in the Hayes Company and Mr. Hayes wanted my services in the land department, which I was hesitant about doing because it required me to sell from a map which I did not believe was possible. He informed me he had bought out there; that it was a fine proposition. He was not an officer of the Company. He was a citizen of Aurora. Mr Hayes said he had not seen the land. Mr Bennett had seen it. I did not talk with Mr McPherson. I cannot recall the details of the report. I did not prior to the time I undertook the sale of the land, receive any adverse reports or criticisms. I did not at any time help the Company prepare for its advertising pamphlets or its literature. I was furnished a great deal of literature for the purpose of selling stock. That was furnished at the company's cost. I do not know where they got it of my own knowledge. I accepted the literature they presented and the statements as being true. I sold the land believing those statements to be true.

Witness identifies a document as his authority to act as land agent; said document offered and received in evidence as Defendant's Exhibit No. 8.

(THE WITNESS) The Hayes Company sold this land at \$200 an acre, \$100 of which was carried back on the mortgage of five years duration drawing 6

(Testimony of Charles F. Fries.)

per cent interest. The other \$100 was to be paid in cash or bankable paper. In addition they agreed to put it all into alfalfa or into an equally valuable crop. They estimated the cost of subduing the soil and putting in a well for irrigation, planting and seeding, at about \$80 an acre. They proposed to advance one-half and the purchaser to advance the other half and we were instructed to get additionally \$40 an acre for crop purposes and it was necessary to get a full and complete settlement and the money turned into the Company before the party went to see the land. Those were our instructions. It was provided in the contract if the purchaser after inspecting the land with an officer of the Company within 90 days, was not satisfied, the money would be refunded. Those were the terms of the contract.

If a man was unable to pay cash we were instructed to take paper which we in turn turned into the bank. The bank gave us a certificate of deposit or bank draft. In nearly every instance the bank would be the bank where the customer did his business. It was always explained to the customer that the notes would be immediately cashed. There have been cases where we agreed to hold the paper for a little period of time. We were not supposed to but we did it. We never cashed any parties' paper without the knowledge of the parties that it had to be done.

(Testimony of Charles F. Fries.)

The land campaign started the early part of July, 1918, and I had been with the Company since January, 1918.

Q I will show you a letter, which I will call United States Exhibit No. 9 for identification, and ask you if that is the preliminary statement of the terms under which you were to work.

(Document handed to counsel for plaintiff.)

MR WEISL: No objection.

Q BY MR MOODY: I will ask you if that is such a letter, and your answer thereto (handing papers to witness).

A Yes, sir.

Q I offer both the letters and the answer as Defendant's Exhibit No. 9.

(Exhibit read to the Commissioner.)

Q BY MR MOODY: Did you sign that?

A Yes.

Q Now I show you a contract dated July 1, 1918, which I will call Defendant's Exhibit No. 10 for identification. Is that the contract that was drawn up pursuant to that letter under which you first sold land for the Daniel Hayes Company?

A Yes.

Q Is that your signature at the end of the contract?

A Yes, sir.

MR MOODY: We offer it in evidence as Defendant's Exhibit No. 10.

(Exhibit read to the Commissioner.)

(Testimony of Charles F. Fries.)

Q Now, Mr Fries, did you adhere to this clause of this contract strictly in all of your subsequent negotiations for the sale of land: "The said salesman to use his best efforts in the sale of said land contracts and to comply with all rules and regulations of the Company which are now or may hereafter be in force, and make no representations, promises or agreements which are not contained in the blanks and literature issued by said company or expressly authorized by it". Did you strictly adhere to that clause of this contract?

A Yes, sir.

(THE WITNESS) All the representations I made to prospective purchasers was authorized either in the literature or through personal interview with members of the company. At the time I undertook the land campaign there was literature prepared which I was to exhibit to prospective purchasers. Referring to Exhibit 4, the pictures of the Chowchilla project were inserted in this salesman's kit at that time for the purpose of enabling me to portray the Chowchilla project to purchasers. I do not know anything about the manner in which the pictures were taken nor did I have anything to do with the taking of them. We were asked to turn in our kit to have the photos put in them and they were put in and sent back to us. These letters in the back of the book (Exhibit 4) signed by a number of people relative to the project were also placed in there at the same time by the company. I was not

(Testimony of Charles F. Fries.)

at that time personally acquainted with any of the people who signed these letters. I accepted these letters at their face value.

It is stipulated that Chowchilla is about half way between Merced and Madera, California, and 18 miles from Merced and 16 from Madera.

Q BY MR MOODY: Now I will show you what I will call Defendant's Exhibit 11 and ask you if that is some of the literature furnished you for the purpose of selling that land.

A Yes, sir.

Said document introduced and received in evidence as Defendant's Exhibit 11.

(THE WITNESS) This literature was not all furnished at one time. It kept coming in different quantities during the campaign. There was hardly a day we did not get something. I am unable to state which came first.

(Pamphlets and literature offered and received in evidence as Defendant's Exhibits 12, 13, and 14 respectively.)

(THE WITNESS) I used those pamphlets and literature for the purpose of selling that land and showed them to my customers.

Q Mr. Fries, this purports to be published by the United States Farm Land Company, and in the inside is a sticker pasted on: "Address all communications to Daniel Hayes Company, General Agents."

(Testimony of Charles F. Fries.)

Was that put on before it was sent to you (referring to Exhibit 11)?

A Yes sir.

Q And this was sent to you by the Daniel Hayes Company?

A Yes, sir.

(THE WITNESS) I had not been to Chowchilla at that time. I was depending on this and other literature of similar character and what I was personally assured in the office of the Hayes Company.

I believed the Hayes Company owned the Chowchilla Ranch of 108,000 acres and it was so represented to me from the beginning.

AFTERNOON SESSION.

November 5, 1921.

CHARLES F. FRIES, recalled.

DIRECT EXAMINATION resumed.

BY MR. MOODY:

Q Mr. Fries, when we took a recess for noon we were discussing Defendant's Exhibit No. 11. What did the officials of the Company tell you relative to this literature, as to the permanency of it?

A They told me it was just a temporary circular until their circulars came off the press.

(THE WITNESS) I did not attempt to sell any land under the contract system as outlined in Exhibit 11. The plan I have heretofore stated is the only plan I attempted to sell any lands on. I was told there was

(Testimony of Charles F. Fries.)

108,000 acres of land less the amount that had been sold to actual settlers. My conversations were mostly with Mr Daniel Hayes, sometimes joined by Mr Sefton and Mr Rogers. They stated that the preliminary work had been done by the United States Farm Land Company, that the settlement had been all made there, that they held 108,000 acres less the amount sold to actual settlers.

MR MOODY: I would like to have the Commissioner look through this Exhibit No. 12 so as to see what the salient statements in that particular exhibit are.

In Exhibit No. 13, which I will hand to the Commissioner, I desire to call attention to this statement on the back: "improvement and cultivation of the Great Chowchilla and Bliss ranches, embracing 134,000 acres at Chowchilla, in the San Joaquin Valley, California, where ideal farming and residence conditions are found, believed to be without equal anywhere else in our country."

I understood the Bliss project was just one of the parts of the Chowchilla ranch.

The book you show me which you have called Exhibit 14 we were told to give to purchasers when they were about to make the trip to guide them. I so distributed this book.

MR MOODY: I want the Commissioner to look at this book, because every fact that has so far been

(Testimony of Charles F. Fries.)

introduced in evidence or will be introduced as to this land and this company is included in this book.

(THE WITNESS) I had nothing to do with getting up the information in this book. I know nothing other than what the pamphlet states or what the officials of the company stated as to the truth or falsity of the statements concerned therein.

MR MOODY: I desire to call particular attention to the statements upon page 17 where it says that 20,000 acres are under cultivation in Chowchilla; and on page 9 it states that there were 108,000 acres printed on the gateway that leads to the tract. I think that book is of special importance due to the fact that it contains all of the representations and was handed to people that were going out to verify those statements themselves.

Letter dated September, 1919, introduced as Defendant's Exhibit 16.

Q BY MR MOODY: I show you a letter, without date, addressed as coming from Mr Daniel Hayes, Jr., president of the Daniel Hayes Company, Chicago, Illinois, being an open letter, and ask you if copies of that letter were furnished you for the purpose of showing your prospective customers (handing same to witness).

A This letter I understood to have been sent to all stockholders and other cases where requests had been received for information from the president.

Q And did they send it to you?

(Testimony of Charles F. Fries.)

A They sent it to all salesmen, and asked us to make it a part of our kit if necessary and show it to our prospects. That letter was sent in connection with a pamphlet that was mailed also, called Twin Profit Farms. I don't believe I have that book.

Letter filed as Defendant's Exhibit No. 17.

(THE WITNESS) I distributed copies of those pamphlets called "Twin Profits Farms" and copies of this letter. I have no copies at the present time.

Q I show you a number of bulletins purporting to come from the Daniel Hayes Company, which I will call, for identification, Defendant's Exhibits 19 to 23, inclusive, and ask you if these bulletins were sent you at succeeding periods for your use in selling the land to your purchasers (handing same to witness).

A Yes. These and many more. They came in every day.

Q And at the present time these are all you have of these bulletins?

A Yes sir.

Q There were many more?

A Yes, sir.

(Papers handed to counsel for plaintiff.)

MR WEISL: We have no objection.

THE COMMISSIONER: They will be received.

(Bulletins filed as Defendant's Exhibits 18 to 23 inclusive.)

(THE WITNESS) I had nothing to do with the compilation of this book called "Twin Profits Farms".

(Testimony of Charles F. Fries.)

I supplied none of the data. I used these bulletins and statements therein in order to sell land. I made representations to my people that are in these bulletins and made them upon the strength of the statements in these bulletins. My first visit to California was in the fall of 1918. I had never been to California previous to that time. I came out with two customers and also wanted to see the land myself. These two parties were George W. Harris, of Paulina, Iowa, and Howard W. Gould from near the same place. There were no officials of the Hayes Company to my knowledge on the train. My brother and I were operating together. He made a trip just prior to mine. When I arrived at Chowchilla I was met by E. B. Smith, of the Chowchilla office. Mr Smith said he was living at Fresno, California, but he had previously lived in Nebraska. Mr Smith took us to the hotel and said he would have time to give us a short ride to see some of the land on Robertson Boulevard and then he would take us out the next day. We went for a short ride to Robertson Boulevard. He accompanied us. We took the customers out and showed them the land that they had bought, I think the next morning. That night we talked with lots of folks at the hotel concerning the project. I don't remember their names but I know one was a garage owner on the corner. He told us it was a great country. A country of opportunity and wanted us *us* to come there, and so forth. Mr. E. B. Smith told us that the country was all right, just a

(Testimony of Charles F. Fries.)

question of location and how much a person could handle; that the land was mainly alfalfa land; that he considered that the feasible crop and most of the purchasers were intending to live upon the land for some time.

When we rode down Robertson Blvd. we saw beds of alfalfa, and homes and it all looked nice and prosperous to us. It was our first trip to California and we all were pretty happy. I saw some young trees and vineyards and things of that kind growing. I saw no land that was white or that looked as though it had salt or alkali on it. This was in the fall of 1918, and the farming operations were going on. They showed us tractors and this land looked as though it was all plowed and broken up. I actually saw the tractors working. I personally had a map with me of the land I had sold and I personally checked the parcels of land with the posts on the land to see that the land that was shown them was the land that was purchased. Mr. Gould liked the land very much and accepted it, and Mr. Harris accepted it. Neither of them found fault with the land. No body around Chowchilla had anything detrimental to say about the land. Mr. Smith said he had been in Fresno for seven years and that one could make more money on a proposition in that country in a month than one could in the East in five years. He spoke of the climate and took us all around. Took us down to Fresno and showed us that country. He introduced us to people, the

(Testimony of Charles F. Fries.)

banker and told them what we were there for. They said the project was fine. There was a general endorsement of the proposition.

Q What was your individual opinion as to the merits of this land after you had personally inspected it?

A Well, it was all new to me, and if they could do what they said they could do there was no *question* but what the land was awfully cheap and offered big possibilities. That was my conclusion. I went away enthusiastic; more so than ever.

Defendant's Exhibit No. 24 identified by witness, offered and received in evidence, being a letter from Mr Gould approving the land.

(THE WITNESS) When I returned I gave people the benefit of my personal investigation of the land in my sales campaign. I told them what I saw out here and what I personally believed to be the future of the country, based upon my investigations and the statements of people I had talked to. During the time I was actively engaged in selling the land literature and belletins continued, such as I have introduced in evidence, to be sent from the home office.

The witness identifies a balance sheet of the Hayes Company for the seven months period ending July 31, 1919, same being offered and received in evidence as Defendant's Exhibit #25.

(THE WITNESS) That statement, or copies of it, were sent to me from the home office.

(Testimony of Charles F. Fries.)

Witness identifies Defendant's Exhibit No. 26, being a Bradstreets report on the Hayes Company, same being offered and received in evidence.

(THE WITNESS) I got this from the Daniel Hayes Company purporting to be a Bradstreet's report. I wrote them and asked for an up to date Bradstreet's report and this was what they sent.

Defendant's Exhibit No. 27, being a report of the Bankers National Reporting Co. on the Hayes Company, identified by witness, offered and received in evidence.

(THE WITNESS) I received that also from the Hayes Company. After my return from California I continued actively selling land. I made a subsequent trip to California in February, 1919. Mr. Fred Cornelius from Alta, Iowa; Mr. George Ward, of Primghar, Iowa, and my brother W. H. Fries, and Rev. Kennedy, a minister from Gaza, Iowa, and E. M. Freerks, of George, Iowa; and Mr. Enno Klinkenberg, of George, Iowa, with myself, completed the party. All except my brother were purchasers who had signed the contract in the manner I have indicated. I negotiated the paper of each one per instructions from the Hayes Company with the knowledge of each of these and with their assent. Mr Ward's paper was held by my brother and part of this by agreement was held until they got back. I don't know about that just now. When we arrived at Chowchilla we were met by officials of the Hayes Company. Mr. Palmer and

(Testimony of Charles F. Fries.)

Mr. Gerald Hayes and there were others. Gerald Hayes is not a relative of Daniel Hayes. This was my first meeting with this man Palmer whom you have read about in these different documents. I don't believe he went to the land with us. He had considerable conversation with my prospects when I was present. He told us it was all good alfalfa land. I remember Mr. George Ward asked him about what we termed the hummocky spots, sort of little minature knolls on the land, on the particular section which Mr. Ward got. I think it was section 2. And the value of these. He said that they contained certain phosphates, that were soft, or something. I don't know. He went on with a technical explanation as to how valuable this land was and how good it was. Except as it might be interpreted here and there to be alkali, there was no alkali of any harmful quantity, or anything of that sort, in the land. He said, "You have a sort of saltine substance that forms here and there, but there is nothing that is harmful. If anything, that would be beneficial."

I saw no white alkali. I believe it was raining. The *The* prospects accepted the land; they even bought more some of them. When they got back Mr. Freerks had printed in a local paper in George, Iowa, an account of his trip, what he had seen and the rest of them were asked to make an expression by wire to the home office as to what they thought of the project.

(Testimony of Charles F. Fries.)

They sent telegrams back there. There was no exception to the satisfaction expressed.

Q And at that time did you have any conversation whatever with Mr. Palmer about the cropping of the land - - how the cropping was progressing?

A That was all discussed, and Mr. Palmer said everything was going along satisfactory. In this case, too, there was a Mr. Schnoor, who had bought land previously from my brother. He was from the same vicinity as these men whom I have mentioned.

When we first met Mr. Schnoor he said he wanted to see my brother, and my brother had sold him two parcels of land, one 40 acres and one 30 and some odd acres, and his contention was that the thirty-odd acres was not what he wanted. There was some difficulty there, anyway. There was some talk about it, and I immediately told my brother to have Mr. Palmer come over and straighten that up, whatever it was; so Mr. Palmer came over right away and they started to talk over there, and he said, "I will adjust anything you want. If you want a different location, or anything you want will be adjusted." And I know Mr. Schnoor said at that time, "Well, you promised to do this before and you haven't done it." Mr. Palmer then said, "Well, it will be done and done promptly; I will guarantee that." So Mr. Palmer said there that he was to take care of it immediately and Mr. Schnoor went out with us then and looked over the

(Testimony of Charles F. Fries.)

property. When we came back, then my brother and I got hold of Mr Palmer alone and asked him about this trouble, and he said Mr Schnoor was just kicking and didn't know what he was talking about, and so on, but he would satisfy him and give him anything he wanted, and for us to go on and not to worry. I know we spent the evening at Mr. Schnoor's house, that same evening we went in there, and had a very pleasant evening, my brother and I and all these people.

Q Now I will show you a large bunch of purported telegrams and ask you if you know what they are and where they came from and to what they refer (handing papers to witness).

A This is a group of telegrams, or copies of telegrams, that were sent me as a salesman to show the prospective purchasers, a brief expression of the different satisfied people, as well as some letters in there from Mr. L. L. Palmer, the agricultural director, to show the progress of things.

MR. MOODY: We desire to offer these one at a time.

MR WEISL: Yes. No Objection.

MR MOODY: The next exhibit number.

THE COMMISSIONER: They will be received in evidence.

Q BY MR MOODY: (After reading defendant's Exhibit No. 25) Now did you know those two men (Molsberry and Kinneth)?

(Testimony of Charles F. Fries.)

(THE WITNESS) I met Mr Molsberry. He is a judge in that district and he gave a very enthusiastic talk on Chowchilla, the soil and possibilities, at a *banquet* that was held in Chicago. You could bring anyone with you. I attended it and he made a speech which was very laudatory. He said it was a country of unlimited possibilities. He bought.

Defendant's Exhibits 28 to 118 inclusive, being *telegram* from purchasers to Haynes Company offered and received in evidence.

Defendant's Exhibits No. 29 and 30 read.

(THE WITNESS) I do not know Mr Herron.

Defendant's Exhibit No. 31 read.

(THE WITNESS) I do not know Mr Muller.

Defendant's Exhibit 32 read.

(THE WITNESS) I don't know Mr. Weber.

Defendant's Exhibit No. 33 read.

(THE WITNESS) I don't know Mrs Harnish.

Defendant's Exhibit No. 34 read.

(THE WITNESS) I do not know him.

Defendant's Exhibit 36 read.

(THE WITNESS) I don't know Mr Chesire.

Defendant's Exhibits 37 and 38 read.

(THE WITNESS) I don't know Mr. McDonald.

Defendant's Exhibits 39 and 40 read.

(THE WITNESS) I do not know Mr Miller.

Defendant's Exhibit No. 41 read.

(THE WITNESS) That is the Mr Rogers who is a director in the Company.

(Testimony of Charles F. Fries.)

Defendant's Exhibit 42 read.

(THE WITNESS) I don't know Mr Legate.

Defendant's Exhibit 43 read.

(THE WITNESS) I don't know John B? Meecham.

Defendant's Exhibit No. 44 read.

(THE WITNESS) I don't know Mr. Skeel.

Defendant's Exhibits 45 and 46 read.

(THE WITNESS) I don't know Mr McFadden.

Defendant's Exhibit No. 47 read.

(THE WITNESS) I don't know him.

Defendant's Exhibit No. 48 read.

(THE WITNESS) I don't know C. H. Elwood.

Defendant's Exhibit No. 49 read.

(THE WITNESS) I don't know John Wingert.

Defendant's Exhibit No. 50 read.

(THE WITNESS) I know Mr. Smith. I met him at Chowchilla with both my parties. I know Mr Fry. I telephoned him regarding this land before I undertook to sell it.

Defendant's Exhibit 51 read.

(THE WITNESS) Mr Palmer is the agricultural director of the project.

Defendant's Exhibit No. 52 read.

(THE WITNESS) This is the Mr Schoor who entertained me and my party at Chowchilla in February, 1919.

Defendant's Exhibit No. 53 read.

(THE WITNESS) I don't know Mr Holdridge.

(Testimony of Charles F. Fries.)

Defendant's Exhibit No. 54 read.

(THE WITNESS) I don't know Mr Faust.

Defendant's Exhibits 55 and 56 read.

(THE WITNESS) I don't know either D. C. Maytag or H. S. Kopel. "Mtown" is Marshalltown.

Defendant's Exhibit No. 57 read.

(THE WITNESS) I don't know Mr Sanders.

Defendant's Exhibits 59 and 60 read.

Defendant's Exhibits 62, 64, 65, 66 and 67 read -- there being no exhibit No. 63.

(THE WITNESS) I am not acquainted with W. T. Neeson or H. Primus.

Defendant's Exhibit No 68 read.

(THE WITNESS) I don't know Mr Claasen.

Defendant's Exhibit No. 69 read.

(THE WITNESS) I do not know Samuel Miller or Peter Larsen.

Defendant's Exhibits 70 and 71 read.

(THE WITNESS) I don't know Mr Gullixson. Colby & Vaughan are salesmen for the Daniel Hayes Company, living in Minneapolis.

Defendant's Exhibit No. 72 read.

(THE WITNESS) I don't know Mr Goepel.

Defendant's Exhibits 73 and 74 read -- 73 being a duplicate of 74; also defendant's Exhibit No. 75.

(THE WITNESS) I do not know Mr. Corsaut

Defendant's Exhibit No. 76 read.

(THE WITNESS) I don't know Mr Johnston.

(Testimony of Charles F. Fries.)

Defendant's Exhibit No. 77 read.

(THE WITNESS) I don't know Mr. Ritchey.

Q Now I will ask you to take this bunch (of telegrams) and turn them over and see if you find any there that you do know, keeping them in the same order, and we confine our reading now to those that you know/ There is something over a hundred of them, all in the same vein (handing telegrams to the witness).

A Yes; that one (indicating).

Defendant's Exhibit 87 read.

(THE WITNESS) He is the Rev. Kennedy that I mentioned as being with me on my second trip.

Defendant's Exhibit 88 read.

(THE WITNESS) That is Mr. Enno E. Klinkenborg, another member of the party at that time.

Defendant's Exhibit 89 read.

(THE WITNESS) That is Mr Corneliusen, also a member of that party.

Defendant's Exhibit No. 90 read.

(THE WITNESS) That is Mr Freerks, who was a member of that party.

Defendant's Exhibit 91 read.

(THE WITNESS) That is George Ward, another member of the party at that time. He is a brother of EM. Ward who is in the court room. I do not know Mr Ackerman who is mentioned in Exhibit 92. (Examines balance of telegrams) I do

(Testimony of Charles F. Fries.)

(THE WITNESS) I believe there was a previous contract which was cancelled at the time this one was signed and on which Mr E. M. Ward made his payments which were in the form of notes which represented half of the purchase price. At the time the first contract was signed he requested we hold the notes as he was going to see the land in the very near future and he saw no occasion for discounting them. I told him the discounting of notes was the regular process of doing business. My brother told him we would hold the notes provided he would go out at the time stipulated. He was not able to get away at the time stipulated. His brother and other acquaintances went at the time stipulated.

When we came back after his brother had seen the land Mr. E. M. Ward said he was desirous of seeing the land, and at that time the office was demanding that we make returns on this particular 324 acres which we had sold to him. My brother went to Mr. E. M. Ward and told him we had to get the returns on the land we had sold him. Mr Ward went over to his banker to see if he could borrow money, stating he would prefer to do that rather than have us take the paper. This transpired at Sioux City, Iowa, in the Hotel Martin, in about February. When he came back from the bank he told us the banker had asked him the purpose he desired this money for and that the banker was inclined to frown on such an in-

(Testimony of Charles F. Fries.)

not know any more of the people who sent these telegrams.

Defendant's Exhibit No. 111 read.

(THE WITNESS) I know Mr. Klaus who wrote that telegram. I did not sell him. I had a talk with him about the land and he told me he had contracted for it. I did not see him after I got back. There are a great many wires I have not got.

Whereupon an *adjournment* was taken until Monday, November 7, 1921, at 1:30 P. M.

November 7, 1921, 1:30 P. M.

Proceedings continued.

CHARLES F. FRIES

resumes stand for further direct examination.

(THE WITNESS) I know Mr. E. M. Ward who sits in the court room and know his brother George Ward. He is the same George Ward who went with me on one of my trips to Chowchilla. I had met E. M. Ward prior to the time we took that trip, I think in January, 1919. Mr E. M. Ward did not accompany me. My brother and I signed up E. M. Ward on a contract. We were working together at the time. George Ward introduced us to his brother, E. M. Ward. This occurred before the trip to Chowchilla when George Ward was along. It was one of the regular contracts.

Contract of E. M. Ward produced by attorney for the Government, introduced in evidence as Defendant's Exhibit No. 119.

(Testimony of Charles F. Fries.)

vestment. Mr. Ward said he had never had to wait for money before and he was used to being accommodated, and he just simply walked out and did not intend to get it. We then told him that we would ourselves discount the notes at the Sioux Falls Savings Bank of Sioux Falls, South Dakota. He said that anything that was satisfactory to us was all right. We then secured proper statement blanks for borrowing power at the Sioux Falls Savings Bank and regular Sioux Falls Savings Bank notes. I talked with Mr. William Ortjes and asked him if he would accept the Ward paper and he said if a proper statement was given he would be glad to do so. Mr Ward finally went with us before an attorney he suggested and made a statement. That was taken together with the papers to the Sioux Falls Savings Bank and discounted and returns made to the company.

MR MOODY: I will read one paragraph of the contract I desire to ask some questions on, (Reading)

“The purchaser having made this agreement without first inspecting the property the Company hereby expressly agrees that if the Purchaser shall personally inspect the property within ninety (90) days of the date hereof accompanied by an officer of the Company so that no mistake may be made as to the location of said tract, the Purchaser may, at his option, if he is not satisfied with said tract, select any unsold lot of equal acreage and of equal price controlled by said Company in place thereof, or may, if he so elects with-

(Testimony of Charles F. Fries.)

in seven days after completing such inspection notify said Company in writing at its office, the Daniel Hayes Building, Chicago, Illinois, that he is not satisfied with his purchase and desires to have his money back, the Company will, within ninety (90) days after receipt of such written notice return to said Purchaser all moneys or notes paid to them without interest."

Now, did you have any conversation with Mr. Ward as to his coming *our* to see the land after he signed the contract and the notes?

(THE WITNESS) Undoubtedly I did. He said he would be glad to go as early as he could. We stated our willingness to go with him. That was the usual process because we always figured we could sell additional acreage, especially to a man of Mr Ward's standing. We did not go with him. Mr Ward left alone about Easter time/ I do not remember just when I heard about the Ward deal again, but I got a letter from Hayes saying that he had heard Mr Ward left alone and was surprised that one of us did not accompany him. This is the letter I have reference to.

Said letter offered and received in evidence as Defendant's Exhibit No. 120, same being read to the Commissioner.

(THE WITNESS) The article referred to in the letter was an article Mr Kennedy wrote after returning from his trip, which was published in the

(Testimony of Charles F. Fries.)

local papers. Mr Jerry Council mentioned in the letter was a salesman.

I next heard of the deal when I was advised by the company that Mr Ward had rejected the deal. I am unable to state the date but sometime late in April. It came from the home office. I went to Chicago to find out the details. I was very much concerned over the Ward project being rejected. I saw Mr Daniel Hayes. He told me not to worry about that particular sale, that Mr Ward had run out of the purchase of the land, but not to be concerned about Mr Ward; that there were a great many people to be sold, but he advised me to see Mr Ward again at the earliest possible moment, which I did. I saw him at Sioux City, Iowa, which is 500 miles from Chicago, soon after this talk with Hayes.

Q Just give the fullest account of the conversation that you had with Mr Ward, what you said and what he said.

A Mr Ward said, "You ought to know why," as soon as I began; "You ought to know why I refused my land." I said "I did not. I am here for that purpose, in fact, I am here to arrange to have you see your way clear to take it if you can." He said, "It is ridiculous. My opinion is that your land proposition is no good. Further my opinion of your company is that it is no good and irresponsible." I then said to Mr Ward, "Mr Ward, you are making a pretty broad statement as to that. I think something isn't

(Testimony of Charles F. Fries.)

right here, something wrong, I don't understand." He then went on to tell me, and I asked him then to tell me his experience and he told me he had gone to the Chowchilla office, Chowchilla, California, office, went in and announced himself and asked to be shown the land which had been contracted for and he said he was shown the land. I said, "Did it not appeal to you, Mr. Ward", and he said "Positively not. I can't imagine what you and George (referring to his brother) and the rest of that bunch could think of to sell and buy such land as that". "Why", I said, "Mr Ward, your statements are astounding; I don't understand them," and he said, "You ought to know who you are working for." I said, "Mr I believe I do. Is there any information you can give me further that I should know; I would welcome it", and he said, he continued talking and said he was shown this land, and he asked I believe Mr Palmer in charge, or whoever was in charge, if that was the best land they had to show and they told him yes, and Mr Ward then told me he went over to the hotel and after a while one of the representatives came over to him at the hotel and said, "Mr Ward, we have some better land to show you", and his reply was as I remember, "Now you fellows told me one time you haven't any better land to show and now again you tell me you have something better. I don't know whether to believe you or not," Mr Ward stated after he was persuaded more he finally decided to go out with them and he said

(Testimony of Charles F. Fries.)

he was then shown some land that looked probably pretty good, as I remember it. He however said in conclusion that he decided he would have nothing more to do with it and I believe he went further by saying he had got other information too, which I don't remember the details now, which made him think the sooner he let loose with what he had and sever his contract with the company the better off he would be. I told Mr Ward that if the picture was really as bad as he painted it to me I naturally did not care to work for the company, that all I wanted to do was to confirm what he had to say to me, I would go to Chicago immediately to see that his money was refunded to him *according to him* according to the terms of the contract. "Well," he says, "I don't believe you will do very much. I have already employed an attorney to look after my interest." I think Mr Ward told me that at that time. At least I was very much concerned and immediately took the train to Chicago. That was the substance of my interview with Mr Ward.

When I got back to Chicago I saw Daniel G Hayes and told him what Ward said and that Ward was demanding his money back. He saw I was very much disturbed and told me Mr Ward would receive his money back, not to pay any attention to his statement relative to the land at all; that he was disgruntled and had come in contact with some California man before going to our representative and naturally was

(Testimony of Charles F. Fries.)

approached before he got to the land. I asked him when the money would be returned and he said, "We are in this position at this time. We have our cash resources pretty well exhausted; we have millions of dollars worth of mortgages, and there's a man in New York today trying to dispose of two million dollars worth of mortgages, and that it may be possible in the case of Mr. Ward we will have to take advantage of the clause that permits us ninety days in which to refund the money". I then told him it was important to return the money at once, and he told me he would do all he could to get it back as early as possible. At this conversation were present J. H. Rogers and Thomas J. Sefton and there was quite a bunch there.

I then went home for a couple of weeks. At this time I was hurt in a railway accident and was required to rest for nearly two months during which time I do not recall I sold any land. After I recovered I went back to Chicago to see Hayes. I told him I understood the money had not been paid back and wanted to know when he intended to pay it. He said most any day. He was making arrangements for a good deal of money which was coming from the mortgages which were to be sold in New York by a man named Peake. I told him I was very much disturbed over it and did not feel inclined to work. He told me I had better rest a while and then he had a proposition up in Elgin and wanted me to go there.

(Testimony of Charles F. Fries.)

He said there was a banker there who had a syndicate buying a large tract of land and asked me to go down and see this banker. When I got there I interviewed the banker and found the statements of his proposition were not true. Two salesmen, Mr Loesch and Mr McKee, went out and saw several parties with me and then the office called me up and advised me Mr George Ward was there and wanted to see me. I saw a Mr Fred Nelson out in Illinois and was introduced to him by Mr Loesch. He said Mr Nelson had been to Chowchilla and bought 20 acres. This was in the presence of Nelson. We asked Nelson why he had not bought more land, and he said he had bought about all he could stand until he sold his farm in Illinois. Mr Nelson said it was a beautiful country of opportunity. Our visit resulted in him buying 20 acres more. I afterwards saw Mr Nelson in the office, I think the next day or two. He said that his funds at the bank were exhausted and he was not able to borrow any more money or else was not disposed to. I asked him if he had sold his land in Illinois and he told me no. I then suggested that he trade his land in as he could not sell it. He said he had not thought of that and we finally entered into such a contract, I think for 120 acres more. The office told me it was never consummated, in fact I never received any commission on the transaction. They told me Mr Nelson did not decide to go through with it and I never heard of it any more.

(Testimony of Charles F. Fries.)

When I got back to the Hayes Company I found Mr George Ward had come down there and asked to have his land purchase reduced or his notes back which represented 40 dollars an acre on 300 acres. I went to Mr Hayes about it and he finally agreed to return Mr Ward his notes and I sent the message down to him to that effect. That was in August, 1919.

At that time I told Mr Hayes I wasn't feeling very well and wanted to get home and rest. He then desired me to take a contract to represent them in Minneapolis and that I open an office there. I told him if everything was cleaned up I would do it. I meant by that to have Mr Ward's money returned, and anything else that was hanging fire. There were several other things. He finally submitted a printed report which is dated September 13, which is in the record here. That was submitted before I signed the last contract. In September they gave me a release from all obligation for my commissions received on the E. M. Ward matter.

(Letter of September 6, 1919, Hayes to Fries offered and received in evidence.)

That is the letter received exonerating me from liability. The gentlemen mentioned in this letter, Mr McElroy, Mr Graves and Mr Bristol, were salesmen operating under me. After I received this letter and a report of the financial condition of the company of September 3, 1919, I entered into another contract with the company.

(Testimony of Charles F. Fries.)

Said contract offered and received in evidence as defendant's Exhibit No. 192, same being dated September 8, 1919.

(THE WITNESS) After receiving this contract I went to Minneapolis. I did not sell any land under it. I prepared for the sale thereof and employed salesmen. I just got my organization working when I was told that Hayes had not paid Ward and did not have all the land he pretended to have. I went to see Hayes and he told me the office was undergoing changes. Mr J. E. Vaughn who had taken half my contract with me, we kept putting the matter of sales off until we were notified November first that our contract was cancelled.

Said letter dated November first, 1919, being a letter from Hayes to Fried, offered and received in evidence as defendant's Exhibit No. 123.

(THE WITNESS) The Hayes company thereafter endeavored to have me go ahead and sell land. I did not sell any. I know a man by the name of George W. Harris. I received the letter which you hand me from him through the mail and the other document which you show me is the answer thereto.

Said letters offered and received as defendant's Exhibit No. 124, same being read to the Commissioner.

(THE WITNESS) Mr Howard Gould is the man who bought land from the Hayes company in the Fall of 1918 who accompanied me on the trip. He

(Testimony of Charles F. Fries.)

subsequently assisted me to sell Mr Raymond Kent. The company he has reference to in this letter is another company that was gotten up there and I represented them for a while. They sold land at Dos Palos north of Fresno.

I was never an officer of the Hayes Company. I never had access to its books nor any voice in the formation of its policies. I never received any compensation for services from the Hayes company other than those mentioned in the contracts mentioned in the record. I was supposed to have received the price of an automobile that was given to salesmen but I never had it.

I have never conspired as alleged in the indictment with any one, two or more or any of the people mentioned therein, to commit any offense against the United States or to defraud any of the class of people stated in the indictment which I hold in my hand. I never knowingly, for the benefit of this corporation or any of the individuals mentioned, make a false statement to any purchaser or person with whom I did business for the Hayes company nor did I knowingly sell land to any person of the class mentioned in the indictment that was not suited for the purpose for which I sold it. I at all times *believes* it was suitable for the purpose for which it was sold.

Referring to page six of the indictment, I did not know about the placing of a letter or circular addressed to one Lewis W. Canby in the mail. I did

(Testimony of Charles F. Fries.)

not at that time know Lewis W. Canby. I did not have anything to do with the mailing or delivering of the circular addressed to Harriet C. Daly, of Marshalltown, Iowa, nor did I know Harriet C. Daly.

I knew nothing about the mailing of the circular described in overt act No. 2. I did not know Louis Rohrssen. My answer is the same as to overt act No. 3. The same applies to all overt acts up to No. 10. I know this man Charles Schnoor. He is the Mr Schnoor I met in Chowchilla. I did not mail the letter nor have anything to do with mailing it. I did not sell Mr Schnoor. My answer is the same as to all the overt acts.

MR MOODY: Isn't it a fact, Mr Weisl, on the rest of the counts in the indictment, the charges are based each upon an overt act.

MR WEISL: Yes.

MR MOODY: They are not conspiracy charges?

MR WEISL: That is true.

Q. BY MR MOODY: Did you have anything to do with mailing any of the literature mentioned in the indictment?

A No sir.

Q Or mailing of the same?

A No sir.

MR MOODY: I think that will cover the balance of these counts in as much as they are all overt acts. That is all.

(Testimony of Charles F. Crim.)

CHARLES F. CRIM, called as witness on behalf of plaintiff, sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WEISL:

My occupation is real estate, and farming. I have been a real estate dealer about eight years and have dealt in lands around Madera and Chowchilla. I was raised on a farm and spent most of my life farming, both in Iowa and California. I am familiar with the Chowchilla Ranch since February, 1915. The Chowchilla Ranch contains approximately 108,000 acres. The land located in the Chowchilla Ranch is good soil. I am familiar with the land in the Chowchilla Ranch being sold by the Daniel Hays Co.

Q. What is the condition of the land that was being sold by the Daniel Hays Co. in the Chowchilla Ranch compared with the condition of the soil of the Chowchilla Ranch as a whole? Give your opinion.

Objection.

Objection overruled subject to right to move to strike out later.

THE WITNESS: It is the poorest part of the Ranch as far as I know and can see; a large portion of it is alkali land. Taken as a whole it has a value of \$40.00 an acre. I made a personal investigation of lots 775, 776 and 777, Block 43, Mr Gould's land. Lots 775 and 776 were fully 90 per cent alkali; Lot 777 probably 30 per cent. I made an examination of

(Testimony of Charles F. Crim.)

Lot 797 in Block 42, land of Mr. Gruns. It is about 40 per cent alkali, I also examined Lots 794, 795 and 796 owned by Mr. Gruns, which ran about the same. I made an examination of the East half of Block 2 of Subdivision 2. I should think this was between 10 and 15 per cent alkali and the surface of the ground is very rough. I would not consider the land fit for agricultural purposes.

CROSS EXAMINATION

BY MR. MOODY:

I made my examination last year after a long hot, dry summer. I do not mean that the percentage of the soil was 30 per cent alkali but that 30 per cent of the visible surface of the soil showed traces of alkali. I judge alkali as much by the absence of vegetation as by the appearance of any crystals. During or immediately after a rain one would not see the white crystals. After the land had been plowed I think a man who had experience in the judging of soil containing alkali could tell whether it contained alkali. Based upon my lifetime of experience I do not think I would be able to detect it.

Q. Suppose you saw a piece of land plowed up that had been rained upon and was still wet and you were making a trip through that territory for the first time and you drove over the land and didn't get out of the machine, would you be able to determine whether or not it was alkali or hard pan?

A. I would not, no, not unless I saw the hard pan dried up.

(Testimony of William Cardwell.)

WILLIAM CARDWELL, called on behalf of the plaintiff and sworn, testified:

DIRECT EXAMINATION

BY MR. WEISL:

I lived near Chowchilla. I am a farmer principally, but have an interest in the bank there. I own a 1500 acre grain farm located in the town of Chowchilla. I have owned it in the neighborhood of 20 years. I am familiar with the land in the Chowchilla Ranch that the Hayes Company was selling; the part that Mr Cline and Mr Johnston and I went around and looked at one day. It was the portion the Daniel Hayes Co. claimed they had for sale. I found a condition of alkali there; I would say 50 per cent alkali what we went over. This land is not as good as the rest of the ranch.

CROSS EXAMINATION

BY MR. MOODY:

I visited the land in the summer or fall two years ago. The Mr Cline I mentioned was the United States District Attorney at Chicago. He and Mr Johnston asked me to drive them around. If I came here from the East in a territory in which I had never seen alkali, it would be difficult to detect alkali in soil after a rainstorm.

RE-DIRECT EXAMINATION

BY MR. WEISL:

I am familiar with land values in that vicinity; I would say the market value of the land that I examined was about \$25 an acre.

(Testimony of Charles F. Crim.)

CHARLES F. CRIM RECALLED

RE-DIRECT EXAMINATION.

I do not know of any person that lived on that land in 1918 or 19 that purchased from the Daniel Hayes Co; I was not there. I have not seen any since who went on their land and farmed it.

CHARLES F. FRIES, the defendant, recalled for further

CROSS EXAMINATION

BY MR WEISL:

Prior to my employment by the Daniel Hayes Co. I was state manager for a life insurance company of Minnesota. I also had a 240 acre farm in St. Paul, Minnesota, which I purchased in 1916. I had never farmed it personally. It was not farmed by any one. It was a wooded farm which I bought to speculate. I had never been engaged in farming operations except in assisting in threshing and hauling grain in Dawson, Minnesota. My father had not been a farmer. I had practically no farm experience. The only The way I sold was in a local way, in Dawson, Minnesota, off and on as occasion presented itself. I was identified in connection with the exchange and transfer of a couple of thousand acres. The average selling price of land was \$40 to \$50 per acre. It was grain land, fit for raising crops. I had no trouble of a serious nature concerning the sale of land during those years; no complaints, no suits. I had heard of alkali before my connection with the Hayes Com-

(Testimony of Charles F. Fries.)

pany; I had seen some in Minnesota. I can detect alkali, in what I understand it to be in the shape of white crystals, that is the only kind we had back there. The thought never occurred to me to detect alkali by the absence of vegetation. If I saw a piece of land where vegetation was absent I would feel there was some excuse why the cropping had not grown. I would not say it was unfit for vegetation, because that part might not have been seeded. Assuming that there was no growth on the land and grass was growing on the land adjacent around it, I do not know what my particular conclusion would be from my experience prior to entering the employ of the Hayes Company, because I never saw such condition in the East. It might be caused by too much or too little water, improper levelling and that sort of thing. I could detect alkali if I saw the land, in the white crystal, from my experience in dealing with land in Minnesota; and I have also reached the conclusion if I saw a piece of land not growing any vegetation with land surrounding it growing some vegetation, that there was something the matter with that land, either too much or not enough water, some cause.

In 1917 when the insurance business went back I took a 60 days leave of absence to get in touch with the Daniel Hayes Company and through an employee became interested in the Company. I met Mr. Hayes in the year 1918. He was not the first man I met

(Testimony of Charles F. Fries.)

connected with the company. The first man was John Day. He was district manager in Waterloo. I met him in Waterloo the first few days in January, 1918. I told him I was there to speak to him and go to work selling their stock that Mr. Perkins told me about. He said it would be necessary to go to the head office at Rock Island. I met Mr. Sefton and Mr. Carter in the head office. One of them was sales manager and I afterwards found out that Mr. Carter was temporary sales manager. They told me the Hayes Company had been instrumental in developing a great part of Iowa and had been instrumental in developing the Twin Falls project. They told me that the Hayes Company had developed the work in Twin Falls. I did not find out it was not a success; I do not know it now. I had been there and saw it. I did not find out in the course of my employment with the Chowchilla project that it had been organized for the purpose of transferring certain dissatisfied holders of land in the Twin Falls project to land in Chowchilla. I do not know that now. And these men told me the United States Farm Land Company had gotten a certain number of settlers together and they told me of all the things that had been actually worked out from time to time after years of experience, and explained that they had three or four hundred actual settlers which the United States Farm Land Company had secured; they held 108,000 acres in the Chowchilla ranch; that they had the whole land for

(Testimony of Charles F. Fries.)

sale outside of what had been consumed by these actual settlers. They told me that in June, 1918. That is the first time I heard details of the California proposition. The first time I had heard that the Hayes Company owned 108,000 acres of land on the Chowchilla ranch was in April or May, 1918. Prior to that time I was selling stock for the Hayes Company and at that time they were just finishing the remnant of the western proposition—the Idaho proposition and preparing for the big California proposition. I don't remember all the things I told them, the stockholders, during the three months I sold stock, concerning the holdings of the Daniel Hayes company. I told them they were identified with different projects in the west. I showed them this (Indicating Exhibit 4). They presented that kit to me in January, 1918. I won't say I read it carefully. The pictures and letters were put in subsequently. At this time it is not in my mind exactly what I had been told the Daniel Hayes Company held. I was not particularly concerned in the stock because the Hayes Company guaranteed all stockholders by reason of placing mortgages with a trust company, which in turn authenticated the stock certificates. I naturally therefore did not take pains to see what their holdings were at that time. Their stock was authenticated with securities binding it. I understood the company was to take over some land in California. I heard that in April or May, 1918. My understanding concerning

(Testimony of Charles F. Fries.)

the stock was that it was 8 per cent preferred stock. The Hayes company had previously paid 12%, making 20% in total. The preferred stock was taken care of first by the payment of 8% each year on the common; then the common participated only to the extent of 8%, and afterwards share and share alike. My understanding as to the source of their dividends was reclaiming lands under the Carey Act and different irrigation work in the west. My first understanding was that it was a company for the purpose of reclaiming and irrigating land, handling and irrigating land in the west.

I first sold stock at Independence, Iowa. I only sold one man there. I have forgotten his name. Then I sold in Aurora, Iowa, to W. L. Frye and a Mr. Berryman. I don't believe I can recall the rest of the names.

Q I will ask you if certain people held stock in the company: Did Mr. Gould hold any stock, purchased from you?

A What town?

Q Larrabee, I believe.

A I don't—not from me, no, sir.

Q Did Mr. Harris own any stock?

A Not that he purchased from me, no, sir.

Q Did Mr. George Ward purchase any stock?

A Not from me.

Q Did Mr. Freerk purchase any stock?

A Mr. Freerk purchased stock from me.

(Testimony of Charles F. Fries.)

THE WITNESS: In the latter part of May 1918 I was told I could not sell any more stock; that I would have to sell land if I remained with the company. It was my understanding that the people who bought stock would receive dividends from the earnings of the company, not from any particular source. I understood that the profits came partly from the sale of Chowchilla lands. I presume it would have been the natural thing for me to have told the stockholders that the greater number of acres of land sold by the company in Chowchilla would mean greater dividends. The instructions to the salesmen were to sell stock to certain persons with a view of encouraging those persons to encourage other persons in the community to buy land in the Hayes Company. These were the instructions I followed. These stockholders got a commission on the land that was sold in their communities. First there was \$5 per acre to be distributed in the community, based on a dollar per one hundred shares of stock. If five men held a hundred shares of stock, they were supposed to receive one dollar per acre on all land sold by the Hayes Company in their community. In addition to that the agent had a contract paying him \$10, \$15 or \$20 per acre and he was privileged to pay any one that would help him; - he was to pay out of his own money. I followed that practice in nearly all instances. The standard was to give the party \$5 per acre. That was paid out of my earnings. My first contract gave

(Testimony of Charles F. Fries.)

me \$20 per acre. I gave \$5 to some one who assisted me, a local man, a banker or agent and \$5 to stockholders was to come from the home office. That did not come out of my commission. The stockholders were limited to receiving \$5 per acre. I went seven or eight months on a basis of \$20 per acre and after that it was \$25 per acre and after that \$50 per acre, which was the highest I ever received. There was an allowance for discount which might run as high as \$55. per acre.

As I said, I was told in April or May that the Hayes Company had title to and owned 108,000 acres of land. I believed that to be true. I did not pay much attention to it because I did not have any idea of selling land. I began selling land in 1918. At that time I believed they owned 108,000 acres. I believed and represented to stockholders that it was worth \$200 per acre. I represented through the literature of the United States Farm Land Company that the Hayes Company was selling it for \$200 per acre; that it was worth \$400 to \$500 per acre. I sincerely believed that they owned 108,000 acres of land, worth at least \$200 per acre. I never gave it a thought as to whether they had title to 108,000 acres. I told purchasers that the Hayes Company owned 108,000 acres. It was my belief and understanding that the title was clear.

Q I show you defendant's exhibit No. 26, which you testified you received from the Daniel Hayes Company in July 1918, before you began selling land for

(Testimony of Charles F. Fries.)

that company, and which purports to be a financial statement of the Daniel Hayes Company, and which financial statement shows that the assets in real property, real estate and equities and improvements on real estate, amount to \$391,058. (Handing paper to witness). Will you look at that. Now you say that statement and you relied on it?

A Yes, sir.

As to how they held the land never occurred to me. I have a common school education. I went to school, including two years in high school. I am familiar with subtraction and addition.

Q In other words, you know that, in round numbers, \$391,000 or say \$400,000, divided by \$200, amounts to \$2000; so that if that statement be true the holdings of the Daniel Hayes Company could not be more than 2000 acres if you believed that the land was worth \$200 an acre. That is true, is it not?

A Yes.

I represented to Mr. Ward and Mr. Nelson that the Hayes Company owned 108,000 acres of land in Chowchilla. The first purchase of land in Chowchilla was from Mr. George Ward, I believe, in July 1918. I met him at Pringhar, Iowa. I don't recall how I met him, perhaps through the hotel proprietor or banker. The only person I saw there was George Ward. I showed him my book and a map and told him this company had this great tract of land. At this time the book contained these exhibits. I told

(Testimony of Charles F. Fries.)

him the possibilities of alfalfa raising. I showed him the Robertson Boulevard; that there were farms along the boulevard; that if he would raise alfalfa on that place it ought to be worth a great deal of money. I showed him the company's literature and he purchased on the basis of the conversation and literature I showed him. I don't remember whether I told him the company owned 108,000 acres; I told him the company was selling this 108,000; it was my understanding that they owned it at the time. I do not know whether I told him anything about the holdings of the company outside of its land holdings. It was my understanding at the time that the company owned the Hayes Hotel Building in Chicago. I could not say when I first found out that they did not own it. I do not recall whether it was before or after. I started selling the land. I don't believe that I represented to purchasers of the Hayes Company that the Hayes Company owned the Hayes Building. I always referred to it as the Daniel Hayes Building, however. It is probably a fact that I made that statement to Mr. Ward, I don't know. It may be that I made that statement to Mr. Nelson. I know where the Chowchilla Hotel is located. It was not my understanding that it was owned by the company. I do not know of any bank owned by the company. It is absolutely not a fact that I represented to customers that the company owned a building in Chicago and a hotel in Chowchilla. It is absolutely not a fact that I made these representations to Mr. Ward and Mr. Nelson.

(Testimony of Charles F. Fries.)

A I went to Chowchilla to make an examination in the fall or winter of 1918; I had probably sold 300 or 400 acres. It might be closer to 1,000 than 500. At that time I was receiving \$20 per acre. I paid my own expenses and gave people \$5 per acre for helping me. It amounted to about 5% for helping me. I gave George W. Harris at Paulina 5%. I sold probably 120 or 150 there through Mr. Harris. I don't remember how much commission I gave to Mr. Harris. It was undoubtedly more than \$200. Mr. Harris was one of the men that accompanied me on my trip to California in December. He may have been one of the men who sent the telegrams. I do not remember whether he did. I do not remember how much land he purchased. I have a partial list of the land sold. It shows here that he bought a total of 79 acres. He didn't contract before he saw the land. He bought one piece afterwards. He paid for it half with notes. I do not know whether he ever received a deed for the land. I was told by parties that they had received deeds. I do not remember the names.

“Q BY MR. WEISL: I call your attention now to a provision in defendant's exhibit No. 119, which is the contract that you had with Mr. Ward, or that the Daniel Hayes Company had with Mr. Ward, for the purchase of land, and on which he has paid \$32,400 cash, according to the terms of the contract. According to the contract “Upon the payment in cash of said \$32,400, the company will cause to be delivered to the

(Testimony of Charles F. Fries.)

purchaser a good and sufficient warranty deed with certificate of title made by the Madera Abstract Company showing a good merchantable title to the land, and the purchaser, upon receipt of said deed and certificate of title, will execute and deliver to the company said note for \$32,400, secured by real estate purchase money mortgage on said land." Now do you know of a single instance where a deed was delivered to a person who contracted in this manner for land in the Daniel Hayes Company and fulfilled the terms of his contract?

A Why there were many cases."

I can't remember the names, but I have seen many deeds going out of the Deed Department to a number of people.

According to this statement I have here I sold personally ten or twelve men. I can't name one of the ten or twelve men that received deeds from the Hayes Company. I WAS ASKED BY MR. Freerks why the deeds were not forthcoming. He purchased in 1919, and he bought some as far back as August 1918. I do not know whether he ever received his deed. He complied with the conditions of his contract. He asked me when the deeds would be forthcoming, probably two months after I sold him the land. I told him it was suspended in the office, that they had some title they were clearing up and they wanted to get some signature on the title before they put the deeds out. I do not recall whose signature; the matter was out of

(Testimony of Charles F. Fries.)

my hands; I had nothing to do with it and I could not keep track of the deeds. It seemed a rather strange method of doing business. I continued making representations that the company would *delivered* the deeds according to the contract, because I believed explicitly in the Hayes Company and that they would do all they said. I saw the deeds going out of the office to the different parties from the Deed Department from time to time. Unfortunately I can't tell you any of the names now.

Mr. Gould and Mr. Hayes were in that party that went to California with me. I believe there was a man by the name of Dick Gray in that party. He was from Larrabee, Iowa. Mr. Harris and Mr. Gray were from Paulina. Dick Gray was not along with me when we went out to see the land. He was not there for the purpose of purchasing the land. He did not purchase any. All my people made contracts to purchase before they went out. Mr. Gould was a stockholder in the original Daniel Hayes Company. I do not believe Larrabee had a quota or 500 shares. I do not know what stock was there. I sold none.

(Document marked Government's Exhibit 1 for identification). Paper handed to witness.

A That is not a stock certificate; it is a special guaranty fund certificate.

In order to get a special guaranty fund certificate a person would have to be a stockholder. In order to get one of these certificates a person had to own 500

(Testimony of Charles F. Fries.)

shares of stock. I have seen that certificate before. That certificate purports to be issued to Mr. Gould, the same Mr. Gould I have referred to.

(Document admitted in evidence as Government's Exhibit No. 1).

I do not know how much land Mr. Gould received from the Hayes Company. I do not know that I sold any land in his district except to him. He would be allowed \$5 per acre on his own land if he held the stock. It is true that if persons in a certain community held shares of stock they would be entitled to \$5 per acre for every acre of land sold in that community. I should think their dividends depended upon the amount of stock, to a certain extent.

Mr. Gray was an acquaintance of Mr. Gould or Mr. Hayes. He rode all the way from Larrabee out. He was a banker at Larrabee, Iowa. I do not think he owns any stock. The lease indicates that Mr. Gray did have stock. When we got to Chowchilla we met Mr. E. B. Smith. He was an officer and acting as escort over the land. We later met Mr. Schmoll, who acted in the same capacity. He was presumed to be an expert in handling California land, irrigating work and that sort of thing. Mr. Schmoll told us the same as all, that it was very good land and big possibilities there. I do not know in particular what he said about the value of the land. He took us out at that time and Mr. Smith took us out. I should imagine I spent three or four hours with Mr. Schmoll. We went over

(Testimony of Charles F. Fries.)

the land in a machine. He said the soil was good. I do not recall all that he said. He said that the soil would grow alfalfa, grain and different things. He took us over to a Mr. Smith, known as Hog Smith, a farmer. He told us he could make more money there on ten acres than could be made in Iowa on a quarter section. He was one of the settlers there. This was on the Chowchilla Ranch. He bought from the United States Farm Company. I testified that the Hayes Company owned the ranch. The United States Farm Company did the preliminary work for the Hayes Company, the actual settlers there. Smith's land was on the east side of the boulevard there, probably a mile. I am lost as to distances. I would not be able to say. On my examination of the land that day I detected no alkali or hardpan. I noticed considerable absence of vegetation. Most of the land was plowed and being prepared for seed at that time -- that is what I mean by absence of vegetation. All of the land was not plowed or growing something. The land Mr. Gould bought was plowed and I think the same with the land that Mr. Harris bought. We all walked over that land. Nothing was said about alkali at that time. Mr. Palmer, at the time we went back toward the office said "There is no alkali in this land of any consequence, in fact if you should discover it should be a kind of saltine substance it would be more favorable to the land than unfavorable." I had never heard about this saltine substance, but I took

(Testimony of Charles F. Fries.)

Mr. Palmer's statement for granted. I knew white alkali when I saw it and had seen some in Minnesota where I had been dealing in land. I want you to believe that when I knew what alkali was -- I did not know its effect on crops. I generally understood it to be if it was there in too large quantities it might be harmful to the crops. I do not remember whether Mr. Gould or Mr. Harris mentioned anything about alkali. I would not say they did not. I did not see any alkali on that land. I got to Chowchilla at four o'clock in the afternoon and left the next day at probably the same time. Mr. John Hermon also said the land was good. We had another man in the Hayes employ; I think the man that plowed the land for the Hayes Company; I did not know that at the time.

At this time an adjournment was taken to November 8, 1921, at 11 A. M.

November 8, 1921, 11 A. M. .

Appearances as before noted.

CHARLES F. FRIES resumes stand for further cross-examination.

I made the statement that George Ward was the first man sold. I find by looking at my records that I was mistaken. Mr. Klinkenborg, George, Iowa, was the first one. He dealt in lands, a resident of George, Iowa. He may have purchased ten or twenty shares of stock in the Hayes Company. There was not 20 shares of stock in George, Iowa. He assisted me in

(Testimony of Charles F. Fries.)

selling land in George, Iowa. He received a commission on a basis of \$5 per acre. I sold about 100 acres through his assistance and Mr. Freeaks. Mr. Freeaks was president of the George Savings Bank. Mr. Klinkenborg did not get credit for the sales of George Ward or E. M. Ward. George Ward got commission on the sales of E. M. Ward. He received a commission of \$5 per acre. He received a commission of \$5 per acre, \$1620. The commission was never to my knowledge turned back to the company after E. M. Ward had rejected the land. I do not recall exactly what I received *ad* commission on the Ward deal. My brother handled the allowances. We paid Mr. George Ward \$1,000 for the trip to California. That was taken out of my commission. The net amount of the commission was \$7,000, or a little over. I never turned that back to the company, despite the fact that Mr. Ward had cancelled his purchase of land within the required 90 days. It was my understanding that I was released from any liability concerning the resale of that land. I know lots of men who were paid their commissions first and did not pay them back. It was understood the agent would pay the commission back or sell an equal acreage without commission.

“Q And in this particular instance you say you received your commission without any liability to resell that land or other land in its place?

A That was an agreement reached between Mr. Hayes and I. If you will permit me to explain it.

(Testimony of Charles F. Fries.)

Q Certainly I will permit you to explain.

A I had previously sold a majority of my land at \$20. an acre and when you pay \$5 per acre commission out of that and \$5 an acre discount on notes and expenses, it leaves you about \$10 an acre or 5 per cent - -

Q You testified - -

MR. MOODY: Let him finish his answer.

THE COMMISSIONER: Finish your answer.

A (Continuing) on the amount of the sale.

Q BY MR. WEISL: You testified, didn't you, Mr. Fries, that your net commission on the 124 acres sold to Mr. Ward amounted to \$7,000?

A At that time my contract was higher, but I was going to get to this point. I discovered Mr. Hayes had been paying other men a larger commission than I had received on earlier contracts, and I also called Mr. Hayes' attention to the fact that I had staid in the office and helped other men on the proposition, and when I called Mr. Hayes' attention to all these things, he appreciated the fact that my contract had not been large enough to start with, and he gave me this letter, which is a certain exhibit here, which shows in consideration for services performed, and so forth, outside of the regular contract, due to the fact that I worked for such a small percentage first, he would waive the possibility of reselling this land that was sold to Mr. E. M. Ward. He gave this letter to me and to my brother."

(Testimony of Charles F. Fries.)

The consideration which I gave for this release was that from time to time I would have to go to Chicago and explain to new salesmen coming on. After that I would say that I spent 20 days. I got \$7,000 out of the Ward deal and my brother an equal amount. Mr. Hayes also took into consideration that my contract was too low and I was not getting equally as much as other salesmen. Some of the others were getting \$35 while I was getting only \$20. That did not raise my suspicion as to the integrity of the company because I had employed salesmen before. I had my contract and they ranged anywhere from 20 to 70 per cent on life insurance. That is the only case of a personal sale where I was permitted to keep the commission after the contract was cancelled. I was also released from sales made by McElroy, L. N. Graves and L. Bristol, while these gentlemen were under me. These gentlemen had some rejections and did not make good to the Hayes Company. I desired to be relieved from them. I explained to Mr. Hayes that these men were out there and money advanced from time to time, \$50 and \$100 to pay expenses and I asked him to be released on that. I was never reimbursed by the Hayes Company for money advanced to them working under me. In the case of Mr. Bristol I did not receive any commission. In the case of Mr. McElroy I received \$15 per acre; he received \$35. He made the sale to Mr. Bruns, August Bruns and John Bruns - John Bruns 57 acres and August Bruns 40 acres.

(Testimony of Charles F. Fries.)

Neither of these gentlemen had rejected the land within the 90 days, to my knowledge. When I asked Mr. Hayes to relieve *my* from responsibility respecting the sale to these men I had in mind such sales as they had made. I had received a complaint on E. H. McElroy, that he had made representations and that he had promised to resell the land. Mr. Freerks or Mr. Klinkenberg came to me and said they made that statement which was not proper and I wanted to be relieved of what those men had done. So far as I can remember I received only commissions on August and John Bruns and on McElroy sales. They were located in the George District at George, Iowa. Mr. Graves sold to Mr. John and Joseph Johnston near George. Mr. Johnston, I do not remember whether he exactly cancelled his contract. He said he did not want the land. He said it was too far from home. He gave no other reason except that he told Mr. Graves was indecent out there and did not treat him right. He said he would reject the land, 40 acres. Mr. Graves also sold to Mr. Mellenma 120 acres on which he received \$15 per acre. That sale had not been cancelled and there was no complaint. There was a sale by Graves and Bristol to C. R. Kent of 80 acres. I did not receive \$15 per acre on that. Mr. Bristol was an old friend of mine. Mr. Harris was also an agent there, that is, George W. Harris. He received \$5 per acre. Part of that was taken out of what I would receive nominally. I received \$8 to

(Testimony of Charles F. Fries.)

\$10 per acre. Mr. Bristol made a sale to Hessel Roorder, 19 acres. Mr. Bristol told me that he wanted a rejection, but he did not comply with the terms of the contract. He said he got homesick when he got there. I was present when the contract was signed. I helped close the deal. I had the same conversation that I had with most any sale that you made. Mr. Bristol had a number of talks with the Roorders' previous to the day of my going over. They were told we had some good alfalfa land to sell. We were trying to sell them land for alfalfa and showed them the possibilities.

In 1918, when I visited Chowchilla, I believed the Hayes Company owned 108,000 acres of land. I can't recall how long I continued in that belief, but I received statements that made me believe that they did not own the land. These statements were made before I left the Hayes Company, probably in September 1919, by Lee Oehlinger of Minneapolis. He told me lots of things about the Hayes Company. He was one of the salesmen and had also been out to Chowchilla as chief manager for the Hayes Company. He told me that the Hayes Company had sold that land on contract and had sold the best part of it and what was left was not good and it was time to get away from it. I did not sell any more land after that. I did not try to sell any more land. I had no agents under me selling land. I did not draw a salary from them. I did not draw any expenses

(Testimony of Charles F. Fries.)

from them. I had started to enlist salesmen to develop the Minnesota territory and was getting along with it pretty well; we got that information from Mr. Oehlinger and Mr. Dexter. We were to develop this territory for the Hayes Company. After September, 1919, I made no endeavor to sell land because I was in doubt about the Hayes Company.

(Telegram identified by the witness as having been sent to Hayes Company offered and received as Government's Exhibit No. 2.)

Original contract between Nelson and Daniel Hayes Company signed by Fries on behalf of the Hayes Company identified by witness, offered and received as Government's Exhibit No. 3.)

It is true I rented office space in Minneapolis in behalf of the Hayes Company.

The copy of the letter marked Government's Exhibit 4 for identification is the letter to me by the Hayes Company.

Said letter offered and received as Government's Exhibit 4.

THE WITNESS: After my visit to Chowchilla I proceeded to Iowa and proceeded to sell land. Between my first and second visit I sold land to George and E. M. Ward. George Ward asked us to go to Sioux City with him to see his brother, that he was sure his brother would buy some of this land. George Ward bought in December, 1918. I do not believe he went to Chowchilla to see the land he had purchased. He had never been to Chowchilla with me until Feb-

(Testimony of Charles F. Fries.)

ruary, 1919. Before going there he had contracted for the purchase of some land, 57 acres. He accompanied me to Chowchilla to inspect this land. I believe he kept the original piece he contracted for. I do not remember that he made any complaint about it. I made one sale to George Ward and my brother made one to him. Then both of us were together and he bought another piece, the half of Section 2, 24 acres. His brother bought the other half adjoining it. I do not remember any exchange made by Mr. Ward in his parcels of land. Mr. George Ward was a stockholder owning, I think, 100 shares. He was entitled to \$1. per acre. He also received \$5 per acre sold through his assistants. On the 324 acres sold to his brother George Ward received \$5 per acre commission. I first met George Ward in Sioux City, Iowa, in January, 1919. His brother said "My brother is alive to the opportunity of making money, or anything that is good"; he said he was well connected and was worth a good deal more than he was and he thought the proposition would appeal to him. This was before my second visit to Chowchilla. I do not believe George Ward had seen any of the land yet. When I met E. M. Ward I took my kit (Exhibit 4) and told him all the things that the Daniel Hayes Company had done in the past, showed him their statements, literature, letters of recommendations in the Chicago Herald and told him they were the biggest proposition, and that the crowning victory of their

(Testimony of Charles F. Fries.)

efforts was the California proposition. I told him this was land upon which you could raise alfalfa and showed him the returns; showed him it was double crop land and he could figure out the returns that were possible. I could not have told him I had personally been over every foot of the land. I might have told him that I was familiar with the character of the soil personally. I did not tell him I had made a personal examination of the soil and found it to be some of the best in California. I had not been over that land personally, every foot of it and observed it carefully. I first contracted to sell Mr. E. M. Ward 324 acres. I took the notes from Mr. Ward, half payment, amounting to \$32,400. There was deducted Mr. Ward's and his wife's expenses, \$1,000. I paid his expenses in advance. That was not the custom with the Hayes Company but it was optional with the sales agent. I personally advanced that money and was not reimbursed by the Hayes Company. I did not handle the notes. My brother handled them. I saw the notes and was present when they were delivered. The purchase price was \$32,400 and deducting \$1,000 left \$31,400 of notes. The agreement with Mr. Ward regarding the discounting of the notes was that they were to be discounted immediately. We had previously made a contract with Mr. Ward and we had then agreed not to discount the notes and would hold them personally with us to Chowchilla. My brother retained the notes and made no

(Testimony of Charles F. Fries.)

effort to discount them. When we came back from Chowchilla the company was calling upon us for settlement of the Ward deal. We then went to E. M. Ward and told him we must have a settlement by discounting them or the money. He then said he would get us the money, and not being able to make arrangements he gave us his notes which we discounted. It is not true that we had discounted a note for \$6400 prior to telling Mr. Ward about it. I was satisfied and believed sincerely that the land we were selling to him was worth \$200 per acre, and that if he went to see it he would be satisfied.

(Letter from Fries to Hayes introduced as Government's Exhibit 5.)

"Q. What *possibly* objection did you have to a man who had purchased 324 acres of land and gave notes to the extent of \$31,400 to go out on that land alone to look at it?

A Because there were many agents on the trains taking the Daniel Hayes prospects from time to time, poisoning their minds in different manners and trying to get them over on their lands. It seemed to me that it was absolutely necessary that a man be accompanied to the extent at least of not having some one else interfering with the sale of land to a prospective purchaser."

I used the expression I was humiliated.

(Letter from Fries to Hayes introduced as Government's Exhibit No. 6.)

(Testimony of Charles F. Fries.)

(Letter from Fries to Hayes introduced as Government's Exhibit No. 7.)

Mr. Ward told me that in his opinion the land that we had picked out was no good; that he could not account for the fact that it had appealed to George and all the rest of the party; that he told them if that was the best land they had they could not do business with him, after which he went to the Hotel, and then one of the representatives came over to him and said they had some land which they thought would appeal to him; that he did not know whether to believe them or not and he thought they were irresponsible; that he did condescend to go out with them again and they showed him land which he thought better of; that he sized up the situation and finally determined that he would have nothing to do with it. I do not remember that he told me anything specifically the trouble with the land. He might have said something about alkali, but I don't remember.

"Q Is it not a fact that he told you that that land was as spotted as a adder with alkali?

A I believe it to be a fact that that land is not spotted.

Q Did you see the land?

..

A Yes, sir."

(THE WITNESS) I saw the land in company with Reverend Kennedy, George Ward and Mr. Schnoor. The Reverend Kennedy is of Gaza, Iowa. I looked at the land and saw no alkali or hard-pan.

(Testimony of Charles F. Fries.)

The land had not been plowed. I do not think there was any vegetation on it. I did not see any crystals of alkali. I would not know what hard-pan was. I noticed elevations which were explained to us by Gerald Hayes as hummocky, or something of that sort. Mr. Ward knew the facts and asked Mr. L. L. Palmer about the land, and he said that these spots indicated very fine land. I believed that to be true. Mr. Palmer was an eloquent speaker and used a lot of scientific terms which I did not know.

“Q BY MR. WEISL: Isn't it a fact that Mr. Ward told you that the land was as spotted as an adder with alkali that it was full of hard-pan and that you couldn't grow sage brush on it, and that you said 'Well, if that is true I will get out of the company myself'.

A I made that remark to Mr. Ward, but as to the other I don't know if I said it.”

Q If you were told that statement did you have any reason to doubt Mr. E. M. Ward's statement about the condition of that land?

A Yes sir.

Q What was your reason?

A One reason was that Mr. Rhodes of Sioux City, Iowa, according to his statement sold Mr. Ward \$20,000 worth of Casualty Bonding stock, and he came to me after I had sold Mr. Ward, my brother and I had sold the land and apparently he was peeved about it and he said Mr. Ward has a right to reject

(Testimony of Charles F. Fries.)

that land and I am going to see that he has."

THE WITNESS: Mr. Ward rejected the land and I do not know that he was ever paid his money back. After the Ward deal I knew that the land was not as represented. After that I sold to Mr. Nelson. I owned 60 acres at one time. At the time I met Mr. Nelson I had 120 acres. I had a contract for it. I had turned in 167 shares of stock on it - Hayes stock. I had paid \$7 for some of it, a part of it \$8 and a part was given to me on commission. When a purchaser desired to turn in stock on the land it was taken in by the company. The Hayes Company credited me \$10 per share.

(THE WITNESS) If I was so told I had reason to doubt Mr Ward's statement because R. W. Rhodes, of Sioux City, Iowa, had sold Mr Ward \$20,000 worth of Casualty Bonding stock and after my brother and I had sold him this land Rhodes was peeved about it and said Ward had a right to reject the land and "I am going to see that he does." He did reject it. To my knowledge his money was not paid back. After the Ward deal I sold to Mr Nelson who is sitting in the Court room. I owned 60 acres at one time. At the time I met Nelson I owned 120 acres. I had no deed, a contract. I turned in 167 shares of Hayes stock on it for which I paid \$7.00 a share on some of it and \$8.00 a share on some of it, and part was given me as commission. The Hayes company cred-

(Testimony of Charles F. Fries.)

ited me at the rate of \$10.00 a share and the balance I paid out of my commissions.

At this point a recess was taken until 1:30 P. M.

1:30 P. M. (The same day.)

CHARLES F. FRIES

Resumes the witness stand for further

CROSS EXAMINATION.

(THE WITNESS) I never received a deed for my 120 acres. I never asked for it. I had an argument with them over it in October or November. I did not farm the land or have any one farm it for me. I did not represent to purchasers that I had 640 acres and particularly not to Mr Nelson. I met Mr Nelson through Mr McKee or Mr Loesch in August or September of 1919. Mr Nelson said he had been out to the property. He thought there were great possibilities there; that he wished he could go out there immediately but wanted to sell his whole place before he did. I don't remember what I told him about that particular tract I was offering him for sale. I don't remember whether I had ever gone over it or not. I did not tell him that from an inspection of that particular land I had reached the conclusion as a land expert that it was the best land in California, fit for growing barley and alfalfa. I told him that Mr Hayes was going to advance the land to \$250 or \$300 an acre. I did not tell him that I would resell it. Thomas J. Sefton, the sales manager told me the land would be raised to \$250 or \$300

(Testimony of Charles F. Fries.)

an acre. I did not have an opportunity to make an additional investigation of the land after the conversation with E. M. Ward in which he told me the land was not as represented and the time I sold Mr Nelson. I did go to Mr Daniel Hayes and Mr Bennett. Mr Bennett was a soil expert in the employ of the Hayes Company. These inquiries I made before I made a connection with the company. After Mr Ward's statement I went to Mr Hayes, Mr Sefton, Mr Rogers and Mr Bennett and salesmen whose names I cannot recall. Everything was going very rapidly and there were always a group of salesmen there and I would make inquiries from every possible party as to whether Mr Ward's statements were true or not. I made no inquiries of experts on soil who were not connected with the company.

Mr Nelson had a farm under contract 160 acres and he told me if he sold that he would buy additional acreage. I did not tell him he would have to deposit \$500 to make good his contract and if he did not live up to the promise he would forfeit the money.

I recall a meeting in Elgin in October, 1919, when several farmers were present. I did not make a statement at that meeting that Government experts had examined the land and reported it to be in A 1 shape. I did not refer to Government experts. I said expert engineers. I do not know any Government experts who examined the land. I referred

(Testimony of Charles F. Fries.)

to the expert opinion of one McPherson whose report I had there. I don't remember that I was introduced as a land expert. If I had been I would say the introduction would be ridiculous. I had nothing to do with the sale of that farm. I remember Mr Glen Russell.

Q I will show you this writing which I will ask to have marked Government's Exhibit No. 8 for identification, and ask you if that is a correct copy of a letter that you sent to Mr Glen Russell.

MR HARRIS: What is the date of that?

MR WEISL: September 11, 1919.

A That letter was perhaps written by me. I had forgotten it.

Q BY MR WEISL: Will you say that it was not?

A I never remember writing it.

Letter offered and received as Government's Exhibit No. 8.

(THE WITNESS) The purchasers of land from me who sent telegrams were Mr George Ward, Mr E. M. Freerks, Mr Enno Klinkenberg, Mr H. W. Gould, perhaps others. They were all stockholders in the Hayes Company that I have mentioned. Mr. Klinkenberg received \$5.00 an acre on the sale of certain lands. Mr. George Ward also. Mr Freerks did not until the last few sales. Mr Gould did not. I think he held 100 shares of stock. I never sold him any stock so I don't know what he had. The

(Testimony of Charles F. Fries.)

Rev. Kennedy was also there and he did not have any stock in the company. He received no commissions. It was suggested to all parties to make an expression to the company as to what they saw and what they believed as to possibilities in Chowchilla. As far as I know the person sending them wrote them; perhaps the company paid for them. I know of no instance where a telegram was sent without the permission of the purported sender.

Government Exhibit No. 9 identified by the witness, offered and received in evidence.

(THE WITNESS) I do not know what the words "wires out tomorrow" refers to therein.

Government's Exhibit No. 10 offered and received in evidence, being a telegram to Fries.

(THE WITNESS) The \$5,000 referred to in this is this, --- they asked me to take a certain portion of this fund and I had agreed with Mr Hayes I would send \$5,000 if it would help them any in this new composition purpose which I did not understand exactly and don't understand yet. In a letter dated December 30, 1919, addressed to George W. Harris I stated I was suspicious of the company and had left the company. I was simply going to give this \$5,000 as a token of the regard which I had for Mr Hayes who I thought at the time had been very much taken advantage of; that he had been fooled on his land contracts; that there were leaks in his office and improper things had been done. For instance, a \$2,000 certificate of

(Testimony of Charles F. Fries.)

deposit had been discounted and \$300 cashed by Mr Benson, the Comptroller. Salesmen were talking about Mr Rogers having been responsible for lots of the trouble and men had undermined the workings of the office. Different salesmen had not paid back money or re-sold land and money had been advanced to some who had not gone to work at all. I intended at that time to do this out of sympathy, but I did not go through with my intentions.

Telegram received by Fries from Hayes Company concerning Nelson deal offered and received as Government's Exhibit No. 11.

Letter from Fries to Hayes company offered and received as Government's Exhibit No. 12.

Reply to Exhibit No. 12 offered and received as Government's Exhibit No. 13.

(THE WITNESS) I don't remember receiving this because I saw no correspondence after the cancellation of the contract on November 1st. Mr Vaughn, my partner in the business in Minneapolis, handled most of the correspondence. My assistant Mr McElroy sold some land to Mr. John Brunss. I had a conversation with Mr Brunes. I said, "Mr Brunes, you have purchased two 19 acre tracts from us, from our representative, Mr E. H. McElroy. There is another 19 acre tract adjoining these two 19 acre tracts which you should take. You have purchased 38 acres, and as I am informed as to your responsibility you are able to buy more land, and it occurs

(Testimony of Charles F. Fries.)

to me that if you take this additional 19 acres that you will be pleased with yourself for having taken it, and if you take it that will give you 57 acres if you buy it at this time", and Mr Brunes said he would go to the bank with me and finally decided to take that 19 acres.

Q Mr Brunes bought a 19 acre tract and 57 acre tract through you.

A Oh, did he?

Q I show you contracts which I will ask to have marked Government's Exhibits Nos. 13 and 14 for identification, and ask you if those are the contracts made with your signature affixed thereto in behalf of the Daniel Hayes Company.

A No sir. Those are Mr McElroy's signatures and myself as a witness. There's a mistake. I think I was a witness to that. I was there.

Q Is that your signature?

A Yes. 19 acres more than I had in my mind had been sold to Mr. Nelson.

Contracts with Mr Brunes offered and received as Government's Exhibits 13 and 14.

(THE WITNESS) I had seen the land sold to Mr Brunes; I did not notice any alkali on it. I don't remember whether it was plowed. I know Mr Frank Justin of McHenryville, Ill. I assisted Mr McKee or Mr Loesch in selling him land. I believe he bought 40 acres. I believe I was allowed \$20 per acre. The commission was \$40 and the salesman got half of that.

(Testimony of Charles F. Fries.)

I don't know Charles J. Payne of Brewster, Minn. I know where Brewster, Minn., is. I know of Mr Payne but I don't remember meeting him. I did not have anything to do with selling him land to the amount of \$8,018, half payment but I can tell you about that transaction. Mr J. E. Vaughn, my partner, sold it. Mr Payne had bought 40 acres of land on some previous occasion and this in some way was substituted for that sale or had something to do with it. I don't know the details. I went to the Hayes office with Mr Payne's contract. Mr Vaughn was my partner and half of what he got went to the office there. This was some time before November first when our contract was cancelled, I think. Mr Vaughn may have done it later, I don't know.

RE DIRECT EXAMINATION

BY MR MOODY:

(THE WITNESS) Government Exhibit No 2 was sent in answer to Government Exhibit No. 11 by me. In reference to Exhibit No 3 which bears date the 3rd of October and has an approval date of the 21st, I don't remember whether that approval was put on there at that time when I went down there in response to the telegram. I imagine the contract was actually signed the date it bears, the 3rd of October. I don't remember how long the Nelson deal had been hanging fire previous to October 3rd. Besides Mr Ward's statements up to the time I sold Mr Nelson the 20 acres I had heard derogatory statements by Mr.

(Testimony of Charles F. Fries.)

Joseph Johnston of George Iowa. He was the man I referred to as being homesick. No one else had told me anything derogatory at that time and I was confident that the soil was good and conditions were good. I had no reason to doubt it except the statement of Mr Ward, except that Mr Oehlinger told me something just previous to the time our contract was cancelled at Minneapolis. I don't know whether Mr Nelson deeded his farm to the Hayes company. He had a contract and whether or not he assigned it I don't remember. I got not a cent out of this deal. Mr Oehlinger's statements were made just a few days before we got notice of our contract being cancelled.

In a letter I wrote Mr Sefton stating Mr Ward would stand for "well regulated pressure" I meant if Mr Ward were approached intelligently and told the possibilities of the land he would be inclined to be with you and accept courtesies. I never had in mind preventing his seeing the land, only to have him see it under the most favorable conditions. Our great object was to sell Mr Ward more land. I had intended using him to sell other people in the vicinity and naturally I was very much concerned about him. I had been warned by stock salesman that he would not accept the land.

When a person visits the land who has obligations, it was our policy to have somebody there who might be able to explain anything they wanted to know.

Mr. Ward was given one thousand dollars in the shape of a credit and not in cash for his expenses

(Testimony of Charles F. Fries.)

to Chowchilla. This credit was charged to my commission.

Q Now, Mr. Fries, when you were asked the question as to whether or not you told these men that you had seen their land, the land that they contracted to buy, was it a fact in a general way that you had driven around and seen that land from an automobile, the land that these men had contracted to buy?

A I never intended, generally speaking, to tell any one what his particular piece was. I was escorted about the ranch pretty well, as I thought, and had been assured by the escorters, Mr. Smith, Mr. Schnorr, Mr. Geral Hayes, Mr. Herndon, Mr. Palmer and *other* that the land was all good and I naturally made those statements.

The only person whom I sold that made a complaint about his deed was Mr. Freerks. I presume the rest got their deeds. After Mr. Freerks spoke to me about his deed he purchased other land. A Mrs. Clark was in charge of the deed department. I talked with her about the deeds. She said they were going out. I talked with her twice.

I have been thinking about the question of Mr. Ward exchanging some of the land. As I recall now Mr. Ward first contracted for 46 acres of land instead of 57 acres and that accounts for this being changed.

RE-CROSS EXAMINATION

Q *** I will show you this diagram, which I will

(Testimony of Charles F. Fries.)

ask to have marked Government's Exhibit No. 15 for Identification.

Mr. Moody: *** Probably the top one will not be permissible, but the bottom one I think will. *** In order not to take it apart why don't you read it?

Q Does your signature appear thereon. A Yes, sir.

Mr. Weisl: I introduce in evidence all except the top part as Government's Exhibit No. 15.

Mr. Moody: It purports to be a regular assignment of that contract dated October 4th. The contract here was dated October 3rd.

(The witness): I witnessed the assignment of a contract held by Mr. Nelson for his tract of land in Saint Charles, Ill. and it was assigned to the Hayes Company in exchange for 120 acres which I sold him.

THURSTON C. SOUDEN, called by defendant, sworn, testified.

DIRECT EXAMINATION

BY MR. MOODY:

(The Witness:) I reside in Los Angeles; business is salesman for C. W. Merrill, distributor for the Western Soil Bacteria Company who sell bacteria for increasing the fertility of soil. I have been in that business three years. I have traveled all over Cali-

(Testimony of Thurston C. Souden.)

fornia as an expert technician and mechanical expert on soils. I am familiar in a general way with the *Chowchilla* ranch and know where the town of Chowchilla is.

Q Do you know alkali land when you see it? A Sometimes.

Q What do you mean by "sometimes"?

A Alkali may be so disguised or even in its natural condition so that without an analysis nobody can tell it.

Q What are the conditions under which it may be disguised?

A Well, the land may be irrigated. After a recent rain, sometimes in its natural state.

Q Now, when a rain occurs what happens to the visible alkali on the surface of the land.

A The natural salts in the alkali are passed off and has a tendency to dissolve in a heavy rain and washed down out of sight.

Q What are those salts composing the white alkali?

A Glauber salts, common table salts and baking soda.

Q Do you believe it is possible from the experience that you have had with alkali for an ordinary man driving over a piece of land, during a rain storm or shortly succeeding a rain storm, to tell without a chemical analysis or without getting out and making a careful examination of the soil as to whether

(Testimony of Thurston C. Souden.)

the land over which he is driving is alkali land?

A Did you say just tell or determine whether it is alkali land? No sir.

Q With your experience that you have had, do you think it would be possible to tell yourself whether it is alkali land?

A No sir.

I have seen alkali there. I recall the main Boulevard there. I don't recall having seen any alkali along that boulevard.

Q Suppose that white alkali land were recently plowed, that is plowed a short time before it was shown to the ordinary un-expert observer, would it be apparent whether it was alkali or not?

A That is more or less governed by the amount of alkali that the soil contains.

Q What, for instance, do you mean by that? Just explain.

A Well, sometimes in some localities the salts that are down in the soil have a tendency to rise quicker to the surface than others and in a case of that kind especially where the soil is very loose, there may be a course or a layer of alkali salts on top.

Q There may be shortly after? A After a plowing, that is a shallow fill.

Q And it is a deep fill?

A It would not show.

Q And *it* it had been broken up without plowing

(Testimony of Thurston C. Souden.)

by a chisel or a heavy rain storm occurred, would the alkali disappear?

A Yes, sir.

***** during such winters as we have in the San Joaquin it might be out of sight a couple of months. I do not believe that it is possible to *driver* over a piece of land which has recently been plowed or which has been plowed and rained upon and tell whether or not it is hard pan soil with digging into the soil. Hard pan does not always show upon the surface. If the hard pan was *tow* or three *feed* down it would not be detrimental.

CROSS-EXAMINATION

By Mr. Weisl:

The Witness: I never heard of the Daniel Hayes Company. I do not know which land the Hayes company was selling, the particular lots or plots. To remove some hard pan it is necessary to dynamite it out of the ground. I have seen hard pan being dynamited. That does not say how hard it is.

Defendant Rests

JOHN BRUNS, a witness called by the Government, sworn, testified as follows:

By Mr. Weisl: I live in Pasadena and formerly resided in George, Iowa. Have been on a farm many years. I bought 57 acres and 19 acres from the Hayes Company; I saw the land after I bought it.

(Testimony of John Bruns.)

It had too much alkali, to my eye, looked white. I saw it the 8th or 9th of July. I paid \$5700 and \$1900. I never asked for a deed. I rejected the land. I did not get my money back. I never saw Mr. Fries after he closed the deal with me.

CROSS-EXAMINATION

BY Mr. MOODY: Mr. Freerks and I have a conversation about the land I bought. I have known him since 1892. He thought the land was very fine and said he had been out to see it. I bought it altogether upon his advice.

E. M. WARD, called on behalf of plaintiff, sworn, testified:

DIRECT EXAMINATION

BY MR. WEISL:

I live in Sioux City, Iowa. I am a married man. I deal in farm lands, and have resided in Iowa since 1910. I met the defendant Charles F. Fries in January 1919. I met him through my brother, who introduced me to Charles Fries and his brother Will Fries. They invited me to their room in the Martin Hotel where they showed me different pictures and gave me a history of The Daniel Hayes Company, and told me of their responsibility. Mr. Fries told me that this land was very productive, that they were selling it on contract subject to approval. He showed me some pictures, but I said I did not care anything about looking at pictures, that you could get them any-

(Testimony of E. M. Ward.)

where; I am interested, if anything, in the type of contract such as you are selling. I took the contract to read it, and the defendant took the contract out of my hand and says: "Here, Ed., here is the part you will be interested in"; and it was a clause giving the proposed buyer the right of rejection. I read that over very carefully two or three times. I said, "Now, that clause is all right if the Company is responsible." And he says "Absolutely". That was in the presence of Charles Fries. All my conversations were when both Fries boys were present. After reading that clause over very thoroughly I said I had no objection, if that clause meant what it said, so I just signed the contract. I thought that was just preliminary. Then they commenced to prepare the notes, and did prepare the notes to the extent of \$32,000. The contract called for 320 acres. They filled out these notes and handed them to me to sign. I read one of the notes; it was "Payable to myself." I says "I don't want to sign notes like that, absolutely not. You could go right out on the street and cash those notes and take the first train out of Sioux City." Ed. says, "Well, you know we have to have confidence in each other". I says, "I know you were introduced by my brother, but I have never met you before. There is only one way I will sign these notes and that is if you will write on the back of these notes 'the collection of these notes is to be governed by one certain contract of Daniel Hayes Company of Idaho, of

(Testimony of E. M. Ward.)

even date' ” They agreed to that. I signed the notes and they gave me a cigar and invited me to supper, a little banquet. I says “That is very nice, but my wife don’t know anything about that; don’t know whether she will object or not”. They said we would go to the theatre and have a little banquet. I told my wife about it, and at first she objected, and I told her they were introduced by my brother and I believed they were all right. There was nothing more said about the writing on the back. We visited in a social way at the banquet and went to the theatre and had a nice time. The next morning it came to me that the writing was not put on these notes. I went up to the Martin Hotel and was informed that the Fries Brothers had checked out. I was worried in a little way, but I did not think there was anything wrong and expected them to come in at any time and I would go and inspect the land. They said there were a number to go and they had to arrange it to accommodate each other. I advised them if it was delayed any length of time it would interfere with another trip I had to make. Finally they got ready just at the time I had to go on this trip and I could not go. I received a telegram from Salt Lake signed by my brother, stating that they were on their way home, had inspected the land, favorable impressions, and arranged to meet us at Sioux City. I went down and found my brother conversing with the Fries Brothers at the Hotel at Sioux City, and we all went up to the room. My brother had signed

(Testimony of E. M. Ward.)

up at the same time I did for some land right across from the boulevard from mine. We had looked at this land and it was too rough and hammocky, and Mr. Fries agreed that it was pretty rough. Mr. Fries said "We made up our minds it would not be advisable for me to take this land". They said they had taken the party to a section of land about a mile south, where there was a full square section unsold. They advised George to transfer his first purchase and would also advise me to change this section. George did make the transfer and expressed a willingness to take half of the section if I would take the other half. We discussed how we would divide the section. It was finally decided to divide it north and south and I would take the east or west section and he would take the other. I finally took the east half. *They* he drew the contract and they prepared the contract in accordance with the notes. When we got ready to have them signed, they said "Boys, by the way, you never put that statement on the back of these other notes; now I want that put on these notes." One of them spoke up and said: "That was on the other notes, not on these". I said "it didn't make any difference, this contract supplements that one." Then they said "We have agreed with George, and we will do the same with you, that we will hold these notes until you have inspected the lands and if you disapprove it we will hand you back your notes." The fact that they had held the other notes and had them right there and presented them and

(Testimony of E. M. Ward.)

the contract and the notes were torn up and destroyed, rather led me to believe that they were on the square. My brother was anxious to get away and said it was getting near train time and he had to go home. My brother said "You had better fix up mine and you can finish fixing up the difference afterwards". It took some time to fill them in and finally my brother said: "I got to go," and he signed the notes and the contract in blank, and I thought to myself "You big chump, signing anything like that, even to your best friends to fill out", and he says "he must have confidence in those fellows." My brother left and they filled out mine. I objected to the fact that the statement was not on the back. As I have stated before it was then they promised to hold the notes until I had visited the land, so I signed them. At the time these contracts were signed they were very insistent that I waive my right of rejection on the ground that my brother and his party had seen it. I can't remember which one of the Fries Brothers said that. I said "I believe my brother and this other man seem to be all right, but I have always made it a rule never to buy any real estate without having seen it myself, then I have no one to blame and I will not vary from that rule". I refused to waive my right of rejection. They prepared a letter in which I was to waive it and it was agreed I was to sign it and turn it in, to send it in. I took it home and turned it over to the authorities. After I signed up my contract I said "Here, I want a copy of that contract" and one

(Testimony of E. M. Ward.)

of them turns to the other and says, I think Charley, "I don't believe we have any of these extra ones." They kept stringing *my* and finally I said, in the way of an order, "Give me one of those contracts." They gave me one. I took the contract home, not that what I believed everything was all right, but I had been doing business with men according to my custom, and it was kind of worrying me, and I sat down with that contract, to read it over, and read it over four or five times a day for a week. It seems as though when I read it over certain clauses would be obsolete and then going on to find a clause which would contradict them, and finally I say their every protection was in the interest of the company and no protection to the signer, and I wrote to my brother and asked him if he had ever studied the contract. I told him I had become suspicious because I did not think any legitimate company would have a contract drawn in such a conflicting way.

I didn't hear anything for a little time and started to go to Pringham and have an interview. As the train was ready to go out I saw William and Charles Fries coming in with a smile and a glad hand, and said they heard I was starting for Pringham. It indicated to me that they had gotten information from my brother that I was wavering and they came down to Sioux City to sooth my ruffled mind. They had called up my house and my wife said I was leaving to go to Pringham. We went back to the depot, I

(Testimony of E. M. Ward.)

turned in my ticket and got my money back, and we went to the Martin Hotel, and they proceeded to explain how unnecessary my fears were, and practically did satisfy me for a time. I remained, planning to go away on the 13th of March. Following the 17th day of February they came to Sioux City and told me they had to make a settlement with the company within 30 days. I says "Why, you fellows told me you would hold these notes and these contracts until I had inspected the land." Ed says, "We expected you were going to go right away". I says, "You had no right to expect it", I says, "I never told you so, and by the terms of the contract I have 90 days." They said, "the company was pounding them on the back and they had to make a settlement, and they would give me an opportunity to discount my own paper. I said I could not discount it, and they suggested that I see the bank. I said I would not ask the bank, and they suggested that I arrange to discount half of it and they would discount the other. When I was expressing my provocation because they insisted on a settlement, they said they had 30 days in which to make a settlement, and they told me they had already sold one of the notes. I said, "You absolutely sold one of them and the 30 days ain't up?" I says, "you fellows are not using me on the square. That is twice you have lied to me; I am going to make a liar out of you again, because I will take the train tonight, which is very inconvenient, and go to California, and will inspect the land

(Testimony of E. M. Ward.)

and will turn it down within 30 days, in which you have admitted I would have to make a settlement with the company. With an oath I jumped up. We were in their room in the Martin Hotel. I called their attention to the clause which provided 90 days and if the client is not satisfied the company will return the notes or cash. They said I was wrong and turned to the part of the contract in which it contains "Received this day from E. M. Ward \$32,400 in cash". So that clause contradicted the one below. I thought if it came to a show-down I was headed off on account of that clause being conflicting with the other one. I says, "I do not say but what the land is all right; I do not know a thing about it, but suppose it is a mountain, suppose it is a lake, and suppose the company is responsible, all these things, if I take my rights in 90 days to inspect the land, which I have a right to by the terms of the contract and they take their rights which they could have by the terms of the contract to refund the money, I pay interest and I am out the use of \$32,400 for practically six months, but I have got to pay that interest and travelling expenses to California and back, to inspect the land". I said "It is a skin game, I have got enough of it". That is when I jumped up and said I would inspect the land and turn it down. Bill said "Hold on, we don't want you to go out there in a prejudiced state of mind." Bill said the interest and travelling expenses would amount in round figures to \$1,000 -- if

(Testimony of E. M. Ward.)

you will execute the remaining notes, \$26,000 worth -- they had sold the \$6400 note -- on the stationery of the German American Savings Bank of Sioux Falls that they could sell the notes and they would take off \$1,000. Charley protested to Will at taking off the \$1,000. I looked at Will and saw Will give Charley the wink, and Charley shut up, and I made up my mind right there I was dealing with confidence men, and I made up my mind I had better go through with I would be \$1,000 to the good, and it would come to a show-down probably in the court some time. I executed new notes for \$25,000 instead of \$26,000 and arranged to go to California as quickly as possible. I left on the 19th of April. I telegraphed my brother to go along but got no reply by telegram. Later I got a long distance 'phone from Will Fries, and he said that George had turned over the telegram, and he was surprised I was going so soon, and asked me if I had not better wait until Monday, Sunday being Easter. I said I was too busy to wait for Easter, that I had my ticket. He said, "Wait and I will come down". I said I did not want him to come down. I started out alone and went directly to Berkeley and telegraphed to the Home Office for the names of authorized agents who would accompany me to the lands. They wired back L. L. Palmer, Gerald Hayes and a Mr. Anderson. I took the bus to Madasca where I knew parties who had originally lived in South Dakota. I thought I would stop there and make in-

(Testimony of E. M. Ward.)

quiry. I did not run across anybody at Madesca that I knew personally. I looked in the windows of real estate agents. They were closed for the night, but I could see this kind of a piece of land was so much and this kind for another amount. In the morning I left on the stage and sat next to a man who said he was going to Chowchilla. I asked him if he knew anything about conditions there. He said he did.

(Conversation between witness and man on bus stricken out as hearsay).

I arrived at Chowchilla about ten o'clock and went right to the office and called for these three men. The young lady said Mr. Palmer was in Chicago and Mr. Anderson and Mr. Hayes were out on the ranch. I gave her my name. About eleven o'clock Mr. Hayes arrived. We went down Robertson Boulevard and then went diagonally across country to Section 2. There was a good lot of land that was broken up. This was on the 25th of April. Wherever this alkali or hardpan existed the crop had withered and died. Between these spots grain was growing. We got down to our section. Right across the road was the hay section that was in crop. It was very hummocky and I began to find faulty with the lay of the land. I said that the land had been represented to me as smooth land, like the Dakota prairie. Mr. Hayes tried to tell me there was no objection. I said "You can't make me believe that that alkali or hard-pan condition is no objection, because I have seen too

(Testimony of E. M. Ward.)

much of it", and he says "Do you expect to buy any land in California that is not more or less alkali, if so, you are going to be disappointed, you might as well go home" and I says "Well, I will go home". Then he says "You had your mind made up before you left home that you was not going to be satisfied" and I absolutely said I didn't. I said "If that is the best you have to show me you might as well save your time and my time". He tried to railroad me into acceptance and I said "You can't get away with that stuff". I was familiar with alkali conditions, we had a great deal in Dakota. After dinner Gerald came down and said the man who had went out with us this afternoon wanted to inspect some land and that from the description I had given him, that they had the right kind of land. Now, I said "I took you for telling me the truth; you told me on the way back if I expected to find land lying smooth and no alkali in California, I might just as well go home"; why did you come around and tell me you have got some." He said that was not literally true. I told him, if he was willing to admit he had misinformed me, I would inspect it. We went up the boulevard and went north, probably a mile and through some fields where there was a piece of land that laid good and looked to me like good soil. I confessed to him that that was a piece that looked nearer right to me than anything I had seen. Without giving the matter a thought I thought the lines were full of representations, but

(Testimony of E. M. Ward.)

the cropping and the contract to me looked like a failure all the way through. I told him that the whole thing looked like a failure, that I had not seen a man working on the 108,000 acre ranch. He had not shown me a well they had down; that the terms of the contract was to immediately put it into crop. He said by reason of the war it was impossible to get material and help, it was out of the question. I told him that I believed the land at \$200 per acre, rightly handled and put into cultivation, was all right, but the way they were handling it it would be eaten up by taxes. I told him I did not believe I would accept it. We went back to the hotel and after supper he asked me to go to the office. He there introduced me to Mr. Anderson and the two of them tried to argue the merits of the proposition. Mr. Hayes finally got tired and left Mr. Anderson and I there alone. I finally told him the land was worth \$200 per acre to an actual settler who would go on it with his family, but under their management it was the bunk, a failure. The land in Section 2 was not plowed. It had never been plowed.

I then asked for a rejection blank and they said they did not have any, that they never had a rejection. They said they had acceptance blanks and I said, "If a blank of rejection would be similar to this one it would reject instead of accept". The man at the office says "We will see you at the train". At that time I expected to go at 7 o'clock in the morn-

(Testimony of E. M. Ward.)

ing but on thinking it over I made up my mind to take the train at one o'clock at night. I arrived at Berkeley at one o'clock Saturday and prepared a note of rejection and wired it to the company. After seeing the land I made up my mind that the company would bear watching as the contract said the notification of rejection must be received in Chicago within seven days of the date of inspection I wondered if they would take advantage of the technicality and refuse notification by telegram. I wired them my notification of rejection and at the bottom said "If for any reason this notification is insufficient or incomplete or unsatisfactory, to wire me at my expense." That was on Saturday afternoon and I got a reply Sunday evening at five o'clock, at which time I received a telegram which said the notification must be in writing. That is what I expected, so just before I sent the telegram I registered a letter to the company, with a copy of the notification of rejection. I also sent a copy of the notification to the First National Bank of Chicago, with instructions to them to go personally and serve it on the officers of The Daniel Hayes Company. After I got home I received a letter from the Hayes Company saying that they had received the notification of rejection on the 30th day of April. I thought then they were satisfied that I had lived up to the terms of my contract. I wrote them and asked them when I would receive the return of my money and never got an answer. Some little time after that Mr. Fries came to Sioux City and asked me to go down to the

(Testimony of E. M. Ward.)

hotel, and I did, and he says he understood I rejected the land and wanted to know why. In a way I scared him considerably for misrepresenting the land the way he had done. I told him it was hummocky, that it was not smooth, that it was spotted like an adder with alkali, that the cropping end of the deal was a complete failure and he started in a line of argument in defense of the proposition. I told him he ought to be ashamed to represent things the way he had under the guise of friendship. He assured me he had no such intention and if it had been misrepresented he was very sorry. He said he would not in the world try to beat anybody or put anything over on a friend like that if it wasn't good and if the company was like I had represented it he would quit them that night. He said they had \$8000 of his money and he would assign his contract. I told him it could not be assigned and he said it had been done and he could do it. I have never been reimbursed by the Hayes Company.

CROSS EXAMINATION

BY MR. MOODY:

I met Mr. Fries sometime in January. I had never seen him before. He was introduced by my brother. My brother told me he had bought California lands before Mr. Fries arrived. I do not think he told me he had bought from the Fries brothers. My brother introduced me to them about two o'clock in the afternoon. My brother left the next day. I signed my

(Testimony of E. M. Ward.)

contract that same afternoon between two o'clock and supper time. I do not know whether my brother stayed two or three days or not. He was there attending a meeting of the directors of the American Bond & Casualty Company. He usually stayed at my house, and if he stopped over night I think he stayed there that time. He admitted he had known the Fries boys for some time, that they had headquarters at Pringham. At first I said I did not want to see them or have anything to do with them. This was while we were at dinner, before they had been introduced. After dinner I said I would walk down but I did not want to meet them. My brother asked me to go to the Martin Hotel and took me over and introduced me to them. It was about two o'clock. I sat down and listened. My brother did not stay there. He did not come back. while we were in the room of the hotel: I think I signed the contract probably at three or four o'clock. I had not seen Fries before. I had made up my mind to tell my brother I would not have anything to do with them. In less than two hours they talked me out of a contract for \$64,800. My business has been buying and selling farms, real estate, for thirty years. I never signed that kind of a contract before or for anybody on that short notice. I never signed a contract for as much as \$64,800 before. It was the biggest contract in my life. I did it in two hours with people I never heard of before, except through my brother. It was

(Testimony of E. M. Ward.)

somewhat due to the fact that my brother had confidence in them, and that I had confidence in my brother. Possibly more because I had confidence in my brother. Probably I would not have talked to them at all except for the confidence in my brother.

“Q Would not have been your habit to give in to anybody trying to sell you things?

A No, sir.

Q As a matter of fact, you are a pretty hard man to handle?

A I believe that is for others to judge.

Q You consider that you would be pretty hard to handle, to hand you anything?

A It has never been done except through my brother.”

The first thing the Fries boys told me in the hotel was about the Hayes Company, their responsibility and their record for 45 to 60 years. My brother had told me before that he had bought some land of the company. I did not know he was a stockholder in the company. I do not remember how much time they talked about the company before they started in on the land, probably half an hour. Then they showed me letters of different men and a map of this territory, showed me where my brother bought his land, told me about this boulevard through there and there was about 240 acres right north of my brother. At that time he had bought something like 75 or 80 acres in two or three different tracts along the boulevard. I picked out this half section on the south side of

(Testimony of E. M. Ward.)

the boulevard, 320 acres. They handed me a contract and I started to read it, and he picked it up and took it out of my hand and says, "Here's the part you are interested in" and didn't give me time to read them. I read one clause which contracted for \$64,800, that is true. There was nothing said about the terms any more than I was supposed to pay one-half. My supposition was that after approval of the land I was to make this payment of one-half. I did not ask them if that was true.

"Q Where did you get that supposition?

A Because they told me you made half of the payment on the land when you buy it, and I didn't see that I bought it until I approved it."

I did not see that statement in the contract but subsequently saw it.

"Q Did they notify you what you were expected to do after you signed the contract?

A Then they sprung this notice."

Then I was suspicious when they did that. I could then have drawn out. They then presented some notes and told me I was expected to sign these notes for \$32,400. I signed them under the terms. I signed them on the back and when they left my hands they were negotiable. I owned as much as \$32,400 at the time I signed these notes. That did not alarm me. I did not put the terms on the back of the notes because I did not know it was my business to do that. They took these \$32,400 worth of notes and agreed to hold them until my brother went on the

(Testimony of E. M. Ward.)

land, if he went within 90 days. That was in the contract, the 90 days. I do not know as I could tell at that time just how long. This clause said I had 90 days. I told them that I could go out and inspect the land pretty soon. I might have told them it would be within 30 days. I do not think my brother told me they held his notes until he went to see the land. They held my notes until the party went out and came back. My brother told me they had went out and looked at it and they thought it was all right. My brother has been a farmer. I think he is running a hospital now. He was a farmer practically ever since I was. Up to the time he made this deal I had no reason to doubt his judgment of real estate. He didn't give me quite as good account of the land as Fries did. I do not know that he contradicted any of the statements of Fries. He told me he was satisfied but he was not enthusiastic. I understand now why he was pressing the sale of this land. I have reference to the \$5 commission. I had been getting a little suspicious of my brother previous to this deal. I was not suspicious on this deal before I heard of this \$5 commission. I was rather inclined to believe he was a victim. When my brother came back he said he had been over Section 2 carefully and was inclined to believe it was all right. He said it laid pretty smooth. He said nothing about alkali. From his report and what the Fries boys had to say about it I signed up for that half section, and he signed up

(Testimony of E. M. Ward.)

for half of the same section, I suppose. I never seen the contract but he told me so and the Fries brothers told me so. It was for the same amount of money, \$64,800. As far as I know he has held to that contract. I have never heard anything different. When I signed the second contract it was the 17th of February. I had not read it over in the meantime. I did not read a copy before I signed the second time, the second time for \$64,000 without reading it. They would not give up the other contract until I would execute this one. They handed me the second contract for signature. When I had it in my hand for signature I did not read it and signed again for \$64,000 without reading it. My confidence had been specially shaken in them. They gave me back my first notes for \$34,200; they were negotiable all this time and they could have cashed them. I had never had any of my paper turned down previous to that time. I think I had credit worth the amount of these notes. The conversation about the \$1,000 discount for myself and wife to make the trip did not take place at that time. They were made out again for \$34,200 and delivered to them. I did not write on the back about the collection. I asked them to do it and they said they had promised to do that on the others but not on these. I signed the notes without seeing this clause was put on. I did not consider it my business to put it on. When they handed them to me it was not on there * * * * * They said they would hold the notes until I would inspect the land and I

(Testimony of E. M. Ward.)

said I would try to get out as soon as I possibly could. They did not tell me they would give me 30 days in which to see the land. I was to see it as soon as I could; no definite time. I did not go out for a little over two months and 90 days from the time I signed the first contract. From the time of the signing of the second contract they came back in 24 days and demanded that it be settled in 30 days. I got sore about it, and said "I will go out on the car tonight and reject it" so as to be within the limit. From that time on I had practically made up my mind I would not take the land. From that time on my negotiations with the Fries brothers was not for the purpose of buying the land but for getting out of my contract. I certainly went out with a prejudiced mind and had no intention when I left of signing up for the land. They came down on the 13th of March and demanded a settlement, and at that time I said "I will get on the train and kill the whole proposition". They didn't tell me they must turn all of the \$34,200 into the company. They said they could turn in a voucher in lieu of cash to make up the \$32,400. I told them at this time it would cost a lot of money and this interest, and they agreed to give me a credit for \$1,000 and I agreed they should cash my paper. They told me they had sold a note for \$6400. Notwithstanding that I gave them new paper for \$25,000. I went over to the bank to see if I could get the money before I made these new notes. The banker wanted to know what I wanted to use it for,

(Testimony of E. M. Ward.)

and I told him I was going to make an investment in California land. He wanted to see the contract. I showed him the dummy contract that I had. At this time I had a copy of the contract and I thought I had pretty well digested it. The banker said he did not seem favorable to California investments. He read part of the contract. I called his attention to the clause of rejection and he asked "What do you know about the responsibility of this company?" I said I thought the responsibility was all right, that my brother recommended them very highly for responsibility. He said he would not let me have the money. I told Mr. Fries that the bank objected to letting me have the money. After they told me they had got to sell these notes and were not living up to their part of the agreement I did not feel that I wanted to have anything more to do with them, but I went out and assisted them to cash my paper for \$25,000, because I got a reduction of \$1,000 to make good this interest I would have to pay and my travelling expenses. I went before a Notary Public and made a statement of liabilities and assets on forms submitted by the Sioux City bank for that purpose. I did not consult an attorney about it. I did not so tell Mr. Fries.

"Q And turned this paper over to them to cash at the Sioux Falls Savings Bank?

A Yes, sir.

Q When was that?

A The 13th of March.

(Testimony of E. M. Ward.)

Q Was it all on the 13th of March that this took place?

A Well, yes, -- the property statement, I think, was next morning. They forgot it the night before and called me up and wanted that, and I went down and made a statement next morning.

Q And then you didn't leave right away for California?

A No.

Q You knew that they did cash your notes for that amount of money?

A I did.

Q And that they had the money?

A Naturally, if they cashed the notes.

Q And you didn't leave until the 19th day of April to go to see the land?

A That is right."

I didn't lose confidence in my brother's opinion as a land expert when I saw that he had accepted, but I do not put my money on another man's judgment as to quality. I absolutely did lose confidence in his judgment on California land. When I came back from California Mr. Fries called on me of his own accord. Mr. Fries said something to this effect: "Now, Ed. I will tell you, I don't want you to think I am questioning your judgment or your ability to judge land, but don't it seem kind of strange that all these other men who are reasonable, good, intelligent men should go out and inspect this land and approve it, and that you are the only one that can see any fault

(Testimony of E. M. Ward.)

in it"? I said that possibly their environments were different from mine at the time they went out.

Redirect Examination

BY MR. WEISL:

I did not know that Mr. Freerk and my brother were getting a commission on the land. If the land had been as represented and the developments had been absolutely as it was represented to be I would have accepted it.

"Q And while you lost confidence in the Fries boys you still had confidence in the Hayes boys?

A I did until I arrived on the tract and saw the conditions.

Q BY MR. MOODY: Did you say you knew Mr. Freerks?

A I found out afterwards * * * this man Freerk, who was a stockholder had bought the note. I did not know him.

FRED O. NELSON, called on behalf of plaintiff.

BY MR. WEISL:

I live in St Charles, Illinois. I am a married man; a farmer. I purchased land from the Daniel Hayes Company about the first days in June 1919, from two gentlemen by the name of Fries and Losch; about 40 acres. I went out to inspect the land in the last days of June. I found that the piece they had plotted out to me on the map was entirely tule, and I got sore about. When I went to the office they said they had another piece they would show me. This piece was

(Testimony of Fred O. Nelson.)

pretty near as bad as the other. I told them I did not want anything to do with the land. This fellow, a man by the name of Smith, said he would show me another piece, and that was half alkali and I did not want it. I walked over a little farther and there was another 40 that looked very good. I said, if you will let me take this 40 for the other I will take it, otherwise I will cancel my contract. They let me have this 40.

Q When did you meet the defendant, Charles F. Fries?

A I would judge around the 15th or 18th of July. Losch introduced Fries as one of the head sales managers of the Daniel Hayes Company. They told me of the great things they were doing in Chowchilla; told me of the responsibility of the company; no greater company in the United States organized for land sales. They wanted to know why I did not go into their cropping agreement. I told them the cropping I seen down there would not pay for the seed. Then they told me they were to have a meeting at Elgin and wanted me to go up and tell my friends around to come up. Fries told me the company had this 108,000 acres and a hotel and bank at Chowchilla and a building at 109 North Dearborn that was worth three million dollars. I went to the meeting at Elgin. Fries made a speech. He said he was an expert on land and dealt in farm lands all his life, and real estate; that this was the biggest opportunity that he

(Testimony of Fred O. Nelson.)

had ever seen; that he had 640 acres for himself and lots of other real estate in the Red River Valley in Minnesota that he was going to sell and purchase more land down there while there was a chance to get it. I didn't just understand, but the understanding was that he was to sell this to some bank, to get security to get more land there. He told how the cattle fattened on the dry grass, the money the farmers were making on grass feeding and alfalfa and how much milk they were getting off the cattle and how many cattle were feeding on 40 acres, and one thing and another like this. He said he was a land expert and he had been over this land and knew the whole tract from start to finish. He didn't say anything at this time about other people examining the land, but previously told me the government experts had been over the land -- said it was so rich it would not need fertilizer for one hundred years or more. Then it ran along for two or three weeks. At the time we were threshing and he started in and wanted me to buy more land. I said 40 acres was all I could handle. He suggested I sell the farm and buy more. They insisted there was a 37 acre piece and I should buy that and I said no, I would not. They said if I would buy it this way -- that if I sold my farm by the first of October I could cancel this contract; so they gave me a contract then and they were to hold the note until the first of October, and if I did not sell my farm by the first of October they

(Testimony of Fred O. Nelson.)

were to return my note. It ran along until about the middle of September and I got notice from some bank in Oregon that the note would be due the first of October; that they were holding a note against me for the Daniel Hayes Company. Then it ran along until the last of September and I got a notice from the St Charles bank that they had a note against me for collection in the sum of \$3700. I went to the bank and refused it. I said I never agreed they should sell the note and for them to reject it. Then the first chance I got to go to Chicago was the 3rd day of October. When I got there Fries was in the office. I went after him. I was pretty sore about it. Fries said "We will get that note back for you". I went in the Sefton office and talked matters over and came out again. He wanted to know if I had not sold the farm. I said there was a couple of parties wanted to buy it but they could not raise money enough so that it would be satisfactory to sell them that way. He came out and says to me "How would you trade?" I said I never thought anything about trading. I told him I could not think about that today, that my car was soon leaving. He says "Well, I will tell you, we have talked the matter over and we will allow you \$150 per acre and 120 acres down here at Chowchilla and \$1500 in cash for the farm." I said I might do it but I could not do it that night, I thought I would come in the next day. He told me this 120 acres was the best piece of land there was; that he had

(Testimony of Fred O. Nelson.)

been over every foot of it and I took his word that it was a good piece of land. I finally agreed that I would take this. He wanted me to sign a note for \$500. You see I did not have a deed on the farm; I had a contract, and if I didn't give the contract this morning they would forfeit this \$500 note on me. My wife was sore when I got home at night because I had gone in and done it this way, so I went in and told them about it. They told me if I wanted to throw up the contract it would cost me \$500. I was in circumstances I could not do that. I told them I had more land than I could handle because of the interest; they had gotten everything I had and I had then \$4000 still in the bank where they cashed these notes. I said I could not do it. He said on the first of November they were going to raise this land to \$250 per acre and I will sell that for \$250 and charge you \$10 per acre commission. I told him if he would do that I would take it that way, but otherwise I could not. I told him if I went into it that way I would want to rent the farm back for another year, because my circumstances were that I could not leave then and wanted to stay another year. They agreed to give me a lease on the farm. They wanted to know what I would give and I said \$8 per acre. They wanted to have the lease call for more than \$8, but I should not pay them more than \$8 because they said it was easier for them to sell the farm if it was rented at a big rent. I would not do that. I says

(Testimony of Fred O. Nelson.)

"Well, the \$1500, I wanted it, because I would have to use it. I borrowed \$4,000 that morning at the bank to buy cattle with. They did not have any money in there and they wanted me to draw for the \$1200 rent and just give me a note for the \$500. They owed me \$127, because they were to pay my fare to Chowchilla the first time on the 37 acre deal. The whole amount they owed me was \$1627. and they wanted to take off \$1200 paid as rent and give me a note for \$427 due September 1, 1920. Fries was not conducting these negotiations on the note; the negotiations were with some of those other fellows that were in the office. Fries told me he owned 640 acres of land at Chowchilla; he said he was farming it and it was bringing him a good income. I signed this contract for the 120 acres. I did not look at the land. I did not ever get my deeds. I did not see this 120 acres until last summer, after they were in bankruptcy. I found about two-thirds of it alkali. There was a little piece on each corner with a little grass on it. It was never plowed.

CROSS EXAMINATION

BY MR. MOODY:

The first men I met were Mr. Fries and Mr. Losch, in June 1919. I had never heard of the Chowchilla project before that. These men were travelling from farm to farm trying to sell. They came to my farm and explained the project. I did not sign the first day; they came back four or five times. I signed the

(Testimony of Fred O. Nelson.)

agreement. I had ninety days for accepting the land. I accepted the 40 acres I picked out. I looked over 1,000 or 2,000 acres of the project. I saw alkali and saw land I did not think much of, and I saw land that I thought was good land. The land I picked out first I found to be alkali.

Q Did these men that sold you this land tell you it was or was not alkali?

A They said in the agreement if there was anything I did not like in this land or if there was anything unsold, I had a right to take my choice out of anything.

Q Did they tell you that the land you bought from them and picked out was alkali land or good land?

A No, they said the fellows in the office recommend this piece of land to be good land.

Q And they had not been there?

A They had not been there.
When I went out there I saw it was a very spotted country, some good and bad pieces.

Q Up to the day you signed the second contract you had never seen Mr. Fries?

A I seen him in between

Q You saw him between the time that --

A No; these agents were out with the contract. The contract was dated July 21, and Fries was out a day or two right after, the day I signed this contract.

(Testimony of Fred O. Nelson.)

Mr. Fries had nothing to do with inducing me to take the first forty acres. I took that on my own judgment. I was satisfied when I came back.

Q And you had a pretty general idea of the country when you came back?

A Well, some of the land looked good, you know.

Q What did you tell your neighbors about Chowchilla?

A Well, I told them there was some of it was pretty good land. I told them just about how the thing was looking. There was some pretty nice dairies there.

Q Did you tell any of your neighbors there was lots of alkali there?

A Yes; I told them there were spots that were worthless.

Q Did you tell them that you were going to pull up stakes as soon as you could and go out there?

A It was my intention to go on the forty acres.

Q Now you say Mr. Fries came out then and talked to you?

A Yes.

Mr. Fries didn't at first try to induce me to take an additional piece of land. He said he was going to hold a meeting of farmers at Elgin and asked me to be present. I agreed. I don't believe I got up and said anything at the meeting - - people personally were talking to me. There were eight or ten people altogether. We were talking matters over, just the way

(Testimony of Fred O. Nelson.)

I found; I told them there were good pieces of land in there and bad pieces of land. I told them I was quite well satisfied with my 40 acres and it was my intention to go out there and make my home. I told Mr. Fries I intended to sell my farm and that if I could sell the farm I would buy some more land. And then he came down and asked me why I didn't sign up for an additional unit next to mine. I told him I would not do it unless I sold the farm. Then I signed up. I got my note back. It had been cashed in the bank. I never paid that note. Mr. Fries said he had 640 acres there at that time. It didn't make any difference as far as my intention to buy land was concerned whether he had the 640 acres or not, except that if people are out selling anything and you buy it, you think you are perfectly safe when they say they have bought. I had been out and seen it, but I never saw how much they had. If he had told me that he had bought an acre I might have made my arrangements to go out, but I would not have made any arrangements to buy any more. I am sure he said 640 acres, a whole section. The fact that the Daniel Hayes Company owned the little hotel at Chowchilla made a difference with me. I stopped at the hotel when I was in Chowchilla. The name was Chowchilla Hotel. I did not see any sign on there that it was owned by the Daniel Hayes people. I did not ask anybody whether it was owned by the Daniel Hayes people. They told me they owned the bank

(Testimony of Fred O. Nelson.)

in Chowchilla. I did not go in the bank while I was at Chowchilla. I did not pay much attention to it. This man Smith, when we drove past it, says "This is the bank the Hayes people own - - Chowchilla Bank".

Q Now isn't it a fact that that is the only place you heard it, and not from Mr. Fries?

A No; all the agents said that. The first fellows that came around told me.

Q And E. B. Smith told you?

A Yes, sir.

(THE WITNESS:) I am absolutely positive Fries told me. The occasion was the first time when he was around. I am not sure Mr. Smith did not say that the bank was the one through which the Daniel Hayes Company did business. He said they owned it. That was prior to the time I met Mr. Fries, and the other men told me also; they all told the same story. When I made this exchange, I came into the Daniel Hayes Company on the 3rd of October. They had been talking exchange for some little time. It was never mentioned that they would take my ranch before that time. He said once he would try to sell it. Mr. Fries put the price of \$150 per acre on the ranch. That price was not satisfactory because I had been offered \$165. They got me cornered talking to me, Mr. Fries did. I never got away, but when you are talking with a man you don't feel like getting up and walking away from him. I did not figure I was losing \$15 per acre, because he offered to sell it at

(Testimony of Fred O. Nelson.)

\$50 per acre profit and take \$10 per acre commission. The Chowchilla land I was to receive was not clear. I never went back to see the land at all until last summer. I went into the company along the first days of November and wanted to see Fries. Fries was gone again. They said that Fries had been in the office and just left. I do not know of my own knowledge whether he had been there or not. I never saw him again at all.

Q Was Mr. Sefton present during all the time Fries was talking to you?

A Well, sometimes Fries and he went and talked between themselves.

Q And is it not a fact that Fries told you that everything he did would have to be O. K'd by Mr. Sefton?

A Well, not all the time. Fries told me that he could O. K. anything that he said would go through. He told me that when we started to talk about the deal with the farm, that anything he O. K'd was all right.

Q When was that?

A That was when we started to talk about trading the farm there; when I got in there.

Q And he did go and consult with Sefton on everything?

A. Well, they talked the matter over between themselves. I don't know what he said to Sefton or what - -

(Testimony of Thurston C. Souden.)

T. C. SOUDEN, recalled on behalf of defendant, testified:

BY MR. HARRIS:

The characteristics of alkali lands are that the alkali usually seeks the high places. The treatment of alkali land is to make hills and dales so as to give this alkali an opportunity to seek the high places. In treating heavy alkali soil, the soil is usually drawn up in ridges and invariably you will find the heavy seeding will grow in a furrow in the bottom. The alkali will be on top of the ridge. I have never seen any alkali land where the alkali was in the low spots, but good land on the high spots.

CROSS EXAMINATION

BY MR. WEISL:

I have seen experiments conducted along these lines all over the southern part of California. Hummocks are especially built in order to attract the alkali to the higher places. A crop will grow in the valleys between the hummocks. The hummocks are made out of natural soil. A piece of land could not contain 50 per cent. alkali.

Q Do you mean that there is not a piece of land which contains 50% alkali?

A No, sir, that is what I mean, there is not.

Q And there is not an acre of land that is complete alkali?

A No, sir, not that I ever heard of.

As a rule land that contains more than 2 per cent.

(Testimony of Thurston C. Souden.)

alkali is crop-prohibitive. I mean two per cent. by volume and not by appearance. Land with two per cent. by volume would be absolutely white, covered, all over. The statistics that we are furnished show that alkaline soil that has greater than half of one per cent. has to be treated to make it productive, by means of hummocks and the gravity system of irrigation and by planting crops that have three different root systems, one that will have a root system working close to the surface, one that goes down four or five inches and another that has roots that will go down four or five feet.

CHARLES F. FRIES, recalled

BY MR. MOODY:

I never told Mr. Nelson I owned 640 acres of land at Chowchilla. The most I ever owned there was 140. I did at one time have a contract for 140 acres. I did not to my knowledge tell him the 240 ranch I had in the Red River Valley, Minnesota was an improved farm and that I had farmed it. I never told him that the Daniel Hayes Company owned a hotel at Chowchilla or that they owned a building at 109 North Dearborn Street. Mr. Nelson volunteered a great many remarks at the meeting at Elgin as to the possibilities of Chowchilla but he made no remarks that were adverse to the proposition.

This was all the testimony taken.

H H Harris

Clyde N. Moody

Attorney for Defendant

Charles F Fries

Thereafter the Commissioner made an order remanding the defendant to the custody of the United States Marshall for removal to the Northern District of Illinois, Eastern Division.

Thereafter Hon. Benjamin F. Bledsoe, Judge of the United States District Court, Southern Division of California, inspected and read the transcript of testimony and all of the exhibits and duly made his order herein remanding the defendant to the custody of the United States Marshall for removal to the Northern District of Illinois, Eastern Division.

Thereafter the defendant served and filed, within the time required by law, and in the manner required by law, his petition for a writ of error, and duly served and filed his assignment of errors.

That said bill of exceptions contains all of the evidence received and heard before the Commissioner in said cause and the proceedings before the Commissioner, and the same is hereby filed and allowed this 17th day of October, 1922.

Bledsoe

District Judge.

IT IS STIPULATED that the bill of exceptions contains all the evidence received by the Commissioner and all the proceedings in said cause.

Joseph C Burke

United States District Attorney.

By Robert B Camarillo

Asst U. S. Atty.

[Endorsed]: 280 Removal IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. UNITED STATES, Plaintiff. vs. CHARLES F. FRIES, Defendant. PROPOSED BILL OF EXCEPTIONS. Received a copy of the within Bill of Exceptions this 3rd day of October, 1922. Joseph C. Burke U. S. Atty. Mack Meader Asst. U. S. Atty Attys for Pltf FILED OCT 3 1922 CHAS. N. WILLIAMS, Clerk By Murray E. Wire Engrossed Bill of Exceptions FILED OCT 17 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Clyde R Moody H. H. HARRIS 346 T. I. & T Bldg Los Angeles, California Pico 5098

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

UNITED STATES OF)	
AMERICA,)	
)	
Plaintiff,)	
)	
vs	)	Assignment of Errors.
)	
CHARLES F. FRIES,)	
)	
Defendant.)	

Comes now the defendant above named, Charles F. Fries, and files the following statement and assign-

ment of errors upon which he will rely upon prosecution of a writ of error in the above entitled cause, a petition for which writ on behalf of said defendant is filed at the same time with this assignment.

I

The Court erred in overruling the objection of the defendant to the indictment, a certified copy of which was introduced in evidence before the United States Commissioner in the hearing of the above entitled cause before him, and the objection of said defendant to each and every count thereof, for the following reasons:

a. That said indictment does not, nor does any count thereof, state facts sufficient to constitute a punishable offense or any offense against the laws or statutes of the United States.

b. The said indictment, and each count thereof, is insufficient and bad in law in that the alleged scheme and artifice to defraud is shown by the specific allegations purporting to set forth and describe said scheme and artifice not to be a scheme and artifice to defraud within the meaning of section 215 of the Federal

c. The said indictment, and each count thereof, is insufficient and bad in law in that whereas it is admitted in said indictment that a portion of the land therein mentioned was fit for cultivation, or capable of easily being made suitable for such cultivation, it is nowhere alleged in said indictment that it was a part of said scheme and artifice to sell land that Penal Code.

was not fit for cultivation to any of the persons or class of persons whom the said indictment alleges the defendants were by the alleged scheme and artifice to defraud.

d. The said indictment, and each count thereof, is insufficient and bad in law in that it is not stated in any of said counts to what persons or individuals the defendants made the pretensions and representations, or conspired to make the pretensions and representations alleged therein to have been made by the said defendants, nor is it alleged that said persons and individuals were to the Grand Jury unknown.

e. The first count of said indictment is insufficient and bad in law in that it is not stated in said count what offenses against the United States the defendants conspired, etc., to commit.

f. The first count of said indictment is insufficient and bad in law in that it is not an offense against the United States to take and receive from the Post Office establishment letters, etc., as alleged in Paragraph 3 of said count.

g. The first count of said indictment is insufficient and bad in law in that it is not alleged that the defendants conspired or intended to use the Post Office establishment of the United States.

h. The first count of said indictment is insufficient and bad in law in that it does not allege that the defendants conspired "to devise a scheme and artifice to defraud", etc.

i. Said indictment, and each count thereof, is insufficient and bad in law in that it does not set forth who were the "other agents" of said corporation mentioned in Paragraph 4 of the first count thereof, nor that said "other agents" were to the Grand Jury unknown,

j. Said indictment, and each count thereof, is insufficient and bad in law in that it is not shown how the defendant Charles F. Fries, was to receive the benefit of the moneys, property, securities, etc., which it is alleged were to be paid and transferred to the Corporation "The Daniel Hayes Company".

k. Said indictment and each count thereof, is insufficient and bad in law in that it is not alleged that the defendants, and particularly the defendant Charles F. Fries, knew that there were excessive natural deposits of alkali on the greater portion of such lands, or that there was a want of continuously running streams or of sufficient rain-fall.

l. The second count of said indictment is insufficient and bad in law in that it refers to a certain circular, to wit the circular set forth in overt act No. 1, under the heading "Overt Acts" in the first count thereof, whereas in said first count there are two overt acts alleged each numbered 1, and therefore said second count is uncertain and vague, and does not inform the defendant of the offense with which he is charged.

m. Counts numbered 2, 3, 4, and 6 are insufficient and bad in law in that each refers to an overt

act in count number one and to a letter or circular referred to by number in count number one under the heading "Overt Acts", whereas no letters or circulars are set out in count number one under the numbers referred to, and therefore said counts numbered 2, 3, 4 and 6 are vague and uncertain and do not inform the defendant of the offense with which he is charged.

n. Counts numbered 5, 7, 8, 9, 10, 11, 12, and 13 of said indictment are insufficient and bad in law in that the various letters and circulars alleged to have been mailed show by their contents that they were not mailed for the purpose of executing said scheme and artifice to defraud, and that they were not part of or connected with the scheme and artifice to defraud alleged in said first count of said indictment and referred to in said other counts.

o. The second to the thirteenth counts, inclusive, of said indictment are sufficient and bad in law in that they do not set forth or charge that the defendants or any of them devised or attempted to devise a scheme and artifice to defraud, within the meaning of section 215 of the Federal Penal Code, nor is any such scheme or artifice set forth or alleged.

p. That said indictment does not, nor does any count thereof, set forth facts sufficient to constitute a cause of action against this defendant.

And the defendant's exception to the overruling his objections to said indictment was duly taken and allowed.

II

That there is no competent evidence in the record to show that said defendant, Charles F. Fries conspired with the other defendants as alleged in said indictment, or that he devised a scheme and artifice to defraud as alleged in said indictment.

III

That court erred in ordering the defendant removed to the Northern District of Illinois, Eastern Division for the reasons stated in Paragraph II hereof.

IV

That the court erred in ordering the defendant removed to said District for the reason that the record and evidence affirmatively show that said defendant did not conspire as as alleged in said indictment, and did not devise a scheme and artifice to defraud as therein alleged.

V

That the court erred, as matter of law, in denying the defendant's motion that he be discharged from custody, to which ruling the exception of the said defendant was duly taken and allowed.

And upon the foregoing assignment of errors and upon the record in said cause, the defendant, Charles F. Fries, prays that the order and judgment of the court rendered therein may be reversed, and he be discharged from custody.

Dated Sept 12, 1922.

Clyde R. Moody

H. H. Harris

Attorneys for said defendant.

We hereby certify that the foregoing Assignment of Errors is made in behalf of the petitioner for a Writ of Error, and are in our opinion well taken, and the same constitute the Assignment of Errors upon the Writ prayed for.

Clyde R. Moody

H. H. Harris

Attorneys for said defendant.

[Endorsed]: No. 280 Rem. UNITED STATES District Court Southern District of California Southern Division In the Matter of UNITED STATES OF AMERICA, Plaintiff, vs. CHARLES F. FRIES, Defendant. ASSIGNMENT OF ERRORS Recd. copy of within this 13th day of Sept. 1922. Mark L. Herron Filed Sept. 14, 1922 Chas. N. Williams, Clerk. By R S Zimmerman, Deputy. CLYDE R. MOODY and H. H. HARRIS Attorneys for defendant. 46 Title Insurance Bldg. Los Angeles, California

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

UNITED STATES OF)
AMERICA,)

Plaintiff,)

vs)

CHARLES F. FRIES,)

Defendant.)

Petition for Writ
of Error.

Your petitioner, Charles F. Fries, defendant in the above entitled cause, brings, this, his petition for a Writ of Error to the District Court of the United States, in and for the Southern District of California, and in that behalf your petitioner says:

That on the 19 day of April 1922, there was made, given and rendered in the above entitled court and cause, an order and judgment against your petitioner, whereby your petitioner was ordered removed to the Northern District of Illinois, Eastern Division, there to answer to an indictment returned against him in said District and Division; and your petitioner says that he is advised by his counsel and avers that there was and is manifest error in the records and proceedings had in said cause, and in the making, giving and entry of such order and judgment, to the great injury and damage of your petitioner, each and all of which errors will be more fully made to appear by an examination of said records, and by an examination of the Bill of Exceptions to be hereafter by *you* petitioner tendered and filed, and the assignment of errors which is filed with this petition; and to the end that the order, judgment and proceedings in said cause may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioner prays that a Writ of Error may be issued directed therefrom to the said District Court of the United States, in and for the Southern District of California, Southern Division, returnable according to law and the practice of the Court, and that there

may be directed to be returned pursuant thereto a true copy of the Record, Bill of Exceptions, Assignment of Errors, and all proceedings had and to be had in said cause, and that the same may be removed unto the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any has happened, may be duly corrected, and full and speedy justice done your petitioner.

And your petitioner makes the Assignment of Errors filed herewith, upon which he will rely, and will be made to appear by a return of the said record, in obedience to said Writ.

WHEREFORE, Your petitioner prays the issuance of a Writ as herein prayed, and that the Assignment of Errors filed herewith may be considered as his assignment upon the Writ, and that the order and judgment rendered as stated in this cause may be reversed and held for naught, and that said cause be remanded for further proceedings, and that he be awarded a supersedeas upon said order and judgment, and all necessary process, including bail.

Charles F Fries

Clyde R. Moody

H H Harris

Attorneys for defendant.

[Endorsed]: No. 280 Rem. UNITED STATES
District Court Southern District of California
Southern Division In the Matter of UNITED

STATES OF AMERICA, Plaintiff vs. CHARLES F. FRIES, Defendant. PETITION FOR WRIT OF ERROR Filed Sept. 14., 1922 Chas. N. Williams, Clerk. By R S Zimmerman, Deputy. Recd. copy of within this 22nd day of Sept. 1922 Mark L. Herron CLYDE R. MOODY and H. H. HARRIS, Attys. for Deft. 346 Title Insurance Bldg., Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

UNITED STATES OF)	
AMERICA,)	
)	
Plaintiff,)	
)	
vs	)	Order Allowing Writ
	)	of Error.
CHARLES F. FRIES,)	
)	
Defendant.)	

Upon motion of Clyde R. Moody, Esq., and H. H. Harris, Esq., attorneys for the defendant, Charles F. Fries, and upon filing the Petition for a Writ of Error and Assignment of Errors, it is ordered that a Writ of Error be and same hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the order and judgment heretofore entered; that pending the decision upon said Writ of Error the supersedeas prayed for

by the defendant in his petition for Writ of Error herein is hereby allowed and the defendant, Charles F. Fries, is ordered admitted to bail upon said Writ of Error in the sum of \$5000.

Dated Sept 13, 1922.

Bledsoe

Judge of the District Court.

[Endorsed]: No. 280 Rem. UNITED STATES District Court Southern District of California Southern Division In the Matter of UNITED STATES OF AMERICA, Plaintiff vs. CHARLES F. FRIES, Defendant ORDER ALLOWING WRIT OF ERROR Recd. copy of within this 13th day of Sept. 1922 Mark L. Herron Filed Sept. 14, 1922. Chas. N. Williams, Clerk. By R S Zimmerman, Deputy. CLYDE R. MOODY and H. H. HARRIS Attorneys for defendant. 346 Title Insurance Bldg. Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

UNITED STATES OF) No.
AMERICA,)

Plaintiff,)

vs.)

BOND.

CHARLES F. FRIES,)

Defendant.)

KNOW ALL MEN BY THESE PRESENTS:
That we, CHARLES F. FRIES as principal, and

CHARLES A. LARSON and GEORGE W. MAR-
CHAND, jointly and severally, acknowledge ourselves
indebted to the United States of America in the sum
of Five Thousand, Two Hundred and Fifty (\$5,-
250.00) Dollars, lawful money of the United States
of America, upon the following terms and conditions:

WHEREAS, the said CHARLES F. FRIES has
sued out a writ of error in judgment of the District
Court of the United States for the Southern District
of California, Southern Division, in the case in said
Court wherein the United States of America are
plaintiffs and the said CHARLES F. FRIES is de-
fendant, for review of said judgment in the United
States Circuit Court of Appeals in the 9th Circuit:

NOW, if the said CHARLES F. FRIES shall ap-
pear and surrender himself in the District Court of
the United States, in the Southern District of Cali-
fornia, Southern Division, on and after the filing in
the said District Court of a mandate of the said Court
of Appeals, and from time to time thereafter as he
may be required to answer any further proceedings
and abide by and perform any judgment or order
which may be had or rendered therein in this case,
and shall abide by and perform any judgment or order
which may be rendered in the said United States Cir-
cuit Court of Appeals in the 9th Circuit, and shall
pay all costs imposed upon him, not exceeding the sum
of Two Hundred Fifty (\$250.00) Dollars, then this
obligation shall be void; otherwise to remain in full
force and virtue.

WITNESS our hands and seals this 13th day of
September, 1922.

Charles L. Fries (SEAL)

Charles A. Larsen (SEAL)

147 N. Rugby St. Huntington Park

(Seal)

George W. Marchand (SEAL)

319 W. Clarendon, Huntington Park

Southern District of California, ss.

GEORGE W. MARCHAND & CHARLES A.
LARSON being duly sworn, each for himself deposes
and says that he is a householder in said District,
and is worth the sum of \$5250 Dollars, exclusive of
property exempt from execution, and over and above
all debts and liabilities.

Subscribed and sworn to before me this 13 day
of Sept. A. D. 1922

Charles A. Larson

George W. Marchand

Stephen G. Long

United States Commissioner

The form of the foregoing Bond and the sufficiency
of the sureties thereto is hereby approved.

Stephen G. Long

United States Commissioner

(SEAL)

Subscribed and sworn to before me
this 13th day of September, 1922

CHAS. N. WILLIAMS,

Clerk U. S. District Court, Southern
District of California.

By L. J. Cordes

Deputy.

Taken and approved this 13th day of
September, 1922, before me.

Bledsoe

District Judge.

Examined and recommended for ap-
proval as provided in Rule 29.

H. H. Harris

Attorney at Law.

O.K. Mark L. Herron

Assistant United States Attorney

[Endorsed]: No. 280 Rem. IN THE District
COURT OF THE UNITED STATES FOR THE
Southern District of California Southern Division
UNITED STATES OF AMERICA, Plaintiff, vs.
CHARLES F. FRIES, Defendant. BOND Filed
Sept. 14, 1922. Chas. N. Williams, Clerk. By R S
Zimmerman, Deputy. H. H. HARRIS 342-343 Title
Insurance Bldg. Los Angeles, Cal. Telephone Broad-
way 5578

UNITED STATES OF AMERICA DISTRICT
COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF
CALIFORNIA

UNITED STATES OF)	CLERK'S OFFICE
AMERICA,)	
Plaintiff)	
- vs -)	No. 280 Rem
CHARLES F. FRIES,)	
Defendant.)	PRAECIPE.

TO THE CLERK OF SAID COURT:

Sir:

Please prepare and make return to the writ of
error herein and make copies of the following papers
in above case:

Assignment of Errors,

Bill of Exceptions

Citation

Minutes

Names & Addresses of Attorneys

Opinion of the Court

Order of Removal

Order allowing Writ of Error

Petition for Warrant of Removal

Petition for Writ of Error

Praecipe

Superseas Bond and Cost Bond

Writ of Error.

H. H. Harris Atty. for defendant

By R. B. Camarillo

[Endorsed]: No. 280 Rem U. S. District Court
 SOUTHERN DISTRICT OF CALIFORNIA
 United States of America Plaintiff vs Charles F. Fries
 PRAECIPE FOR Copies of papers in case Filed Oct
 17 1922 CHAS. N. WILLIAMS, Clerk By R S
 Zimmerman Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED
 STATES, SOUTHERN DISTRICT OF
 CALIFORNIA, SOUTHERN
 DIVISION.

UNITED STATES OF)	
AMERICA,)	
Plaintiff,)	CLERK'S
vs.)	CERTIFICATE.
CHARLES F. FRIES,)	
Defendant.)	

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing pages, numbered from 1 to inclusive, to be the Transcript of Record on Writ of Error in the above entitled cause, as printed by plaintiff in error, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, writ of error, petition for warrant of removal, notice of application for order of removal, opinion, order of removal, bill of exceptions, assignment of errors, petition for writ of error, order allowing writ of error, bond, and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Writ of Error amount to and that said amount has been paid me by the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of October, in the year of our Lord One Thousand Nine Hundred and Twenty-two, and of our Independence the One Hundred and Forty-seventh.

CHAS. N. WILLIAMS,

Clerk of the District Court of the
United States of America, in and
for the Southern District of California.

By

Deputy.

United States
Circuit Court of Appeals

For the Ninth Circuit.

6

CLALLAM COUNTY, WASHINGTON, WILLIAM A. NELSON, Sheriff of Clallam County, Washington, E. C. STEWART, Treasurer of Clallam County, Washington, and J. O. MORSE, Assessor of Clallam County, Washington,

Appellants,

vs.

THE UNITED STATES OF AMERICA, and UNITED STATES SPRUCE PRODUCTION CORPORATION, a Corporation,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

FILED

NOV 15 1922

F. D. MONCKTON,
CLERK.

United States
Circuit Court of Appeals

For the Ninth Circuit.

CLALLAM COUNTY, WASHINGTON, WILLIAM A. NELSON, Sheriff of Clallam County, Washington, E. C. STEWART, Treasurer of Clallam County, Washington, and J. O. MORSE, Assessor of Clallam County, Washington,

Appellants,

vs.

THE UNITED STATES OF AMERICA, and UNITED STATES SPRUCE PRODUCTION CORPORATION, a Corporation,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Counsel.

WILLIAM B. RITCHIE, Esq., Solicitor for Appellants, Port Angeles, Washington.

F. L. PLUMMER, Esq., Solicitor for Appellants, Port Angeles, Washington.

T. F. TRUMBULL, Esq., Solicitor for Appellants, Port Angeles, Washington.

ELLIS, FLETCHER & EVANS, Solicitors for Appellants, Tacoma, Washington.

THOMAS P. REVELLE, Esq., United States Attorney, Solicitor for Appellees, 310 Federal Building, Seattle, Washington.

JOHN A. FRATER, Esq., Assistant United States Attorney, Solicitor for Appellees, 310 Federal Building, Seattle, Washington.

CAREY & KERR, Solicitors for Appellees, Yeon Building, Portland, Oregon.

OMAR C. SPENCER, Solicitor for Appellees, Yeon Building, Portland, Oregon. [1*]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 294—E.

UNITED STATES OF AMERICA and UNITED
STATES SPRUCE PRODUCTION COR-
PORATION, a Corporation,

Plaintiffs,

vs.

CLALLAM COUNTY, WASHINGTON, WILL-
IAM A. NELSON, Sheriff of Clallam
County, Washington, E. S. STEWART,
Treasurer of Clallam County, Washington,
and J. O. MORSE, Assessor of Clallam
County, Washington,

Defendants.

Complaint.

Plaintiffs for cause of suit allege:

I.

This is a suit arising under the laws of the United States, and the plaintiff, United States Spruce Production Corporation, is a corporation organized under and pursuant to certain Acts of Congress, under the laws of the state of Washington, and a citizen of that state.

The defendant, Clallam County, is a duly organized and acting municipal corporation of the State of Washington, and the defendant, William A. Nelson, is a duly elected and acting sheriff of

Clallam County, Washington, and the defendant, E. S. Stewart, is the duly elected and acting treasurer of Clallam County, Washington, and the defendant, J. O. Morse, is the duly elected and acting assessor of Clallam County, Washington. The matter in dispute herein exceeds the sum of three thousand dollars, exclusive of interest and costs, and the United States of America [2] joins in order to protect its interest.

II.

During the times herein mentioned, the plaintiff, United States Spruce Production Corporation, was and now is a corporation created under the laws of the State of Washington by the Director of Aircraft Production under and pursuant to the Act of Congress of July 9, 1918, amending the act of April 11, 1918 (U. S. Comp. Stat. 1919, Compact Edition Appendix, page 1771), for the purposes hereinafter more fully set forth, and the plaintiff prior to the filing of this complaint was duly licensed and authorized to transact business in the State of Washington and had in all respects complied with the laws of that state entitling it to transact business in that state.

III.

Under and pursuant to the laws of the United States, particularly the Act of Congress of June 3, 1916 (Chapter 134, 39 Stat. 166, at p. 213, sec. 120), the Act of Congress of March 4, 1917 (Chapter 180, 39 Stat. 1192), and the Act of Congress of July 24, 1917 (Chapter 40, Stat., p. 243, 1917, sec. 9), and other enactments, the President of the

United States authorized the purchase and acquisition of spruce and fir lumber among other commodities, as war material, and authorized the construction of aircraft for use in the navy and in the army of the United States, within the amount of appropriations and in compliance with the terms of the said acts. Through the War Department and under the direction of the Chief Signal Officer of the United States Army, plans were made for the production of such war material, including the building of the railway hereinafter mentioned. [3]

IV.

By the above-mentioned act approved July 24, 1917, authority was given to the President acting through the War Department during the existing emergency occasioned by the state of war between the United States and the Central European Powers for the purchase, manufacture, maintenance, repair and operation of airships, and other aerial machines, including the acquisition and development of plants, factories and establishments for the manufacture of airplanes, aircraft, machines and appurtenances, the purchase of raw and semi-finished materials therefor, and of all other things necessary for creating and extending the production of airplanes, aircraft, engines and all other appurtenances, and the sum of six hundred and forty million dollars (\$640,000,000.00) was appropriated for the purpose of carrying the said act into effect. Under the provisions of the Act of Congress approved March 4, 1917, being sections 3115-1/16a, 3115-1/16b, 3115-1/16c and 3115-1/16d

of the United States Compiled Statutes, Compact Edition, the President was authorized and empowered within the limits of funds appropriated therefor, to requisition for the use of the Government during the war emergency, war materials and plants for the production of "War Materials," which included arms, armament, ammunition, stores, supplies and equipment for ships and airplanes and everything required for or in connection with the production thereof, and was authorized to exercise the power and authority so vested in him and to expend the money appropriated by means of and through such agency or agencies, as he might determine upon from time to time. By the Act of Congress approved April 11, 1918, as amended by the Act of Congress approved July 9, 1918, the Secretary of War was authorized to acquire [4] by condemnation lands and interests in lands for military purposes, including standing or fallen timber, sawmills, camps, machinery, logging roads, rights of way, equipment, materials and supplies and any works, property or appliances suitable for the effectual production of such lumber and timber products. The said last-mentioned act further provided that when the owners of such land, interest and rights appurtenant thereto should fix a price for the same which in the opinion of the Secretary of War, would be reasonable, he might purchase or enter into a contract for the use of the same at such price, without further delay.

V.

Accordingly, the Government of the United

States in the existing war emergency, under the direction of the President and Secretary of War, being in need of spruce, fir and other lumber for the manufacture and production of such war material, especially aircraft, and in order to facilitate the production of such lumber products, undertook the construction of certain logging railroads in the States of Washington and Oregon for the transportation of such lumber products as would be required in the manufacture of aircraft and for other purposes. These operations were originally begun by the Signal Corps, Aviation Section of the United States Army, and later by the Bureau of Aircraft Production, Spruce Production Division of the United States War Department, these being the agencies through which the powers vested in the President of the United States and the Secretary of War under the foregoing Acts of Congress were exercised. Among other logging railroads so constructed is the logging railroad hereinafter described, known as Spruce Production Railroad No. 1 in Clallam County in the State of Washington, and among other property or rights acquired was the property hereinafter described.

[5]

VI.

For the purposes aforesaid and under the said acts of Congress, the United States, acting through the Signal Corps of the United States Army, entered into a contract with Siems, Carey-H. S. Kerbaugh Corporation for the construction of the railroad hereinafter described and for the acquisition

of the rights of way therefor. Nearly all of the right of way and lands acquired for that railroad and nearly all the property and rights herein described were acquired through the last-named corporation, and that corporation also performed the work or nearly all of the work of constructing the said logging railroad. Afterwards, however, all of these properties were transferred to the plaintiff, United States Spruce Production Corporation, as hereinafter more particularly shown, and additional rights of way were acquired by said plaintiff and additional work was done upon said railway line by it. The said railroad was constructed upon a route located and designated by the United States Government and the said railway line with its rights of way and appurtenances as built and constructed was built for and with all other property and rights herein described was acquired by and became the property of the United States, although the title thereto was transferred to the plaintiff corporation and still is carried in the name of said plaintiff for convenience.

VII.

The following is a description of the property which is the subject of this suit, and which was acquired in the name of plaintiff, United States Spruce Production Corporation, for the use and benefit of the United States Government, all of said property being located in the county of Clallam, State of Washington, to wit: [6]

(a) That certain logging railroad known as "Spruce Production Railroad No. 1," as the same

is now staked out, located, established and/or constructed over and across the following described parcels of real property:

The northeast quarter (NE. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$), the southeast quarter (SE. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$) and the southwest quarter (SW. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$) of Section thirty-six (36), township thirty-one (31) north, range nine (9) west, Willamette Meridian.

The southeast quarter (SE. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), the northeast quarter (NE. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the northwest quarter (NW. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the northeast quarter (NE. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$), the northwest quarter (NW. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$), the southwest quarter (SW. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$) and the southeast quarter (SE. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$), Section thirty-five (35), Township thirty-one (31) north, range nine (9) west.

The southeast quarter (SE. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$) of section thirty-four (34), Township thirty-one (31) north, range nine (9) west, Willamette Meridian.

Lots one (1) and two (2), the southwest quarter (SW. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), the southeast quarter (SE. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$), the northeast quarter (NE. $\frac{1}{4}$) of the southwest quarter

(SW. $\frac{1}{4}$), and the southeast quarter (SE. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$) of Section three (3), Township thirty (30) north, range nine (9) west, Willamette Meridian.

The northeast quarter (NE. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$), the southeast quarter (SE. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$), the northeast quarter (NE. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$), the southeast quarter (SE. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$), and the southwest quarter (SW. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$) of Section ten (10), Township thirty (30) north, range nine (9) west, Willamette Meridian.

The northwest quarter (NW. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), the northeast quarter (NW. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$) and the southeast quarter (SE. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), of Section fifteen (15), Township thirty (30) north, range nine (9) west, Willamette Meridian.

Lots four (4), five (5) and six (6), lots one (1) to eleven inclusive of Frank Anderson's Subdivision of a portion of Government lot seven (7), and the unplatted portion of lot seven (7), lots one (1) to fourteen (14), inclusive of Idlewild Subdivision of Government lot eight (8), all in [7] section fourteen (14), township thirty (30) north, range nine (9) west, Willamette Meridian.

Lot one (1), lots one (1) to twenty-six (26), inclusive of Sunrise Beach Subdivision of Gov-

ernment lots two (2) and three (3), and a portion of lot four (4), an unplatted portion of lot four (4), and lot five (5), section twenty-three (23), township thirty (30) north, range nine (9) west, Willamette Meridian.

Lots one (1), two (2) and three (3), the southwest quarter (SW. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$) and lot four (4), section twenty-six (26), township thirty (30) north, range nine (9) west, Willamette Meridian.

Lot one (1), the southeast quarter (SE. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$) and lots two (2), three (3), four (4) and five (5), section twenty-seven (27), township thirty (30) north, range nine (9) west, Willamette Meridian.

Lot one (1), lots one (1) to forty-eight (48), inclusive, and lots fifty-one (51) to fifty-six (56) inclusive of Sunshine Cove Subdivision of Government lots two (2) and three (3), and lot four (4), all in section twenty-eight (28), township thirty (30) north, range nine (9) west. Willamette Meridian.

Lots one (1), two (2), three (3) and four (4), the southwest quarter (SW. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$) and lot five (5), section twenty-nine (29), township thirty (30) north, range nine (9) west, Willamette Meridian.

Lot sixteen (16), the southeast quarter (SE. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), lots fifteen (15), fourteen (14), one (1) and two (2), lots one (1) to twenty-three (23) in-

clusive, of Elmer Day's Subdivision of Government lots twelve (12) and thirteen (13), and lots three (3), eleven (11), four (4), five (5) and six (6), all in Section thirty (30), township thirty (30) north, range nine (9) west, Willamette Meridian.

Lots twenty-seven (27), twenty-six (26) and twenty-five (25), section nineteen (19), township thirty (30) north, range nine (9) west, Willamette Meridian.

The southeast quarter (SE. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the southwest quarter (SW. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the southeast quarter (SE. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$), the southwest quarter (SW. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$) and the northwest quarter (NW. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$) of section twenty-four (24) township thirty (30) north, range ten (10) west, Willamette Meridian. [8]

The northeast quarter (NE. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the northwest quarter (NW. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the southwest quarter (SW. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the southeast quarter (SE. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$) and the southwest quarter (SW. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$), Section twenty-three (10) west, Willamette Meridian.

The northwest quarter (NW. $\frac{1}{4}$) of the

The Northwest quarter (NW. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$), Section twenty-

six (26), township thirty (30) north range ten (10) west, Willamette Meridian.

The northeast quarter (NE. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$) the northwest quarter (NW. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), the northeast quarter (NE. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$) and the northwest quarter (NW. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$), Section twenty-seven (27), township thirty (30) north, range ten (10) west, Willamette Meridian.

The northeast quarter (NE. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$) the southeast quarter (SE. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), the southwest quarter (SW. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), the southeast quarter (SE. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$) and the southwest quarter (SW. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$) of section twenty-eight (28) township thirty (30) north, range ten (10) west, Willamette Meridian.

Lots one (1), eight (8), seven (7) and six (6), the northwest quarter (NW. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$) and lot five (5), section twenty-nine (29), township thirty (30) north, range ten (10) west, Willamette Meridian.

Lot six (6), the northeast quarter (NE. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the northwest quarter (NW. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), and lots seven (7) and eight (8),

section thirty (30), township thirty (30) north, range ten (10) west, Willamette Meridian.

Lots nine (9), twelve (12) and eleven (11), and the southwest quarter (SW. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$) of section twenty-five (25), township thirty (30) north, range eleven (11) west, Willamette Meridian.

The southeast quarter (SE. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the southwest quarter (SW. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the southeast quarter (SE. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$) and lot nine (9), section twenty-six (26) township thirty (30) north, range eleven (11) west, Willamette Meridian.

Lot eleven (11), the southwest quarter (SW. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the southeast quarter (SE. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$) and the southwest [9] quarter (SW. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$) of section twenty-seven (27), township thirty (30) north, range eleven (11) west, Willamette Meridian.

Lot five (5) of section twenty-eight (28) township thirty (30) north, range eleven (11) west, Willamette Meridian.

The northeast quarter (NE. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), the northwest quarter (NW. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$) the Northeast quarter (NE. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$) and the northwest quarter (NW. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$) of section thirty-three (33), township

thirty (30) north, range eleven (11) west, Willamette Meridian.

Lot one (1), the southeast quarter (SE. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), the southwest quarter (SW. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), the southeast quarter (SE. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$) and the southwest quarter (SW. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$) of section thirty-two (32), township thirty (30) north, range eleven (11) west, Willamette Meridian.

Lots twelve (12) nine (9), eight (8) and seven (7) section thirty-one (31) township thirty (30) north, range eleven (11) west, Willamette Meridian.

Lots twelve (12) eleven (11), nine (9) and seven (7), section thirty-six (36), township thirty (30) north, range twelve (12) west, Willamette Meridian.

The northeast quarter (NE. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the northwest quarter (NW. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the northeast quarter (NE. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$) and lot six (6), section thirty-five (35), township thirty (30) North, range twelve (12) west, Willamette Meridian.

The northeast quarter (NE. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$) the northwest quarter (NW. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the northeast quarter (NE. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$) and the northwest quarter (NW. $\frac{1}{4}$) of the southwest quarter

(SW. $\frac{1}{4}$) of section thirty-four (34), township thirty (30) north, range twelve (12) west, Willamette Meridian.

The northeast quarter (NE. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the northwest quarter (NW. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$) lot eight (8), the northeast quarter (NE. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$), the southeast quarter (SE. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$), the southwest quarter (SW. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$) of section thirty-three (33), township thirty (30) north, range twelve (12) west, Willamette Meridian.
[10]

The southeast quarter (SE. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), the southwest quarter (SW. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), the southeast quarter (SE. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$), the southwest quarter (SW. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$) and the northwest quarter (NW. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$) of section thirty-two (32), township thirty (30) north, range twelve (12) west, Willamette Meridian.

The southeast quarter (SE. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), the northeast quarter (NE. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), the northwest quarter (NW. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), and lots seven (7), two (2) and three (3), section thirty-one (31), township thirty (30), north, range twelve (12) west, Willamette Meridian.

Lots ten (10), eleven (11), five (5), seven (7) and six (6), and the southwest quarter (SW. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$) of section thirty-six (36), township thirty (30) north, range thirteen (13) west, Willamette Meridian.

The southeast quarter (SE. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the southwest quarter (SW. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the southeast quarter (SE. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$), lot three (3), and the northwest quarter (NW. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$) of section thirty-five (35) township thirty (30) north range thirteen (13) west, Willamette Meridian.

The northeast quarter (NE. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the southeast quarter (SE. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the northwest quarter (NW. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$), the southwest quarter (SW. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$) and the southeast quarter (SE. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$) of section thirty-four (34), township thirty (30) north, range thirteen (13) west, Willamette Meridian.

Lots two (2), three (3), four (4) and five (5), section three (3) township twenty-nine (29) north, range thirteen (13) west, Willamette Meridian.

(b) That certain mill site particularly described as follows:

Block eight (8), (except S. P. A. & W. right of way), blocks eight and one-half ($8\frac{1}{2}$) eleven (11), eleven and one-half ($11\frac{1}{2}$) twelve (12) and twelve and one-half ($12\frac{1}{2}$), tide lands of the first class east of Laurel Street, lying in front of the City of Port Angeles. [11]

Blocks eight (8) and eight and one-half ($8\frac{1}{2}$) ten (10) and ten and one-half ($10\frac{1}{2}$), eleven (11) and eleven and one-half ($11\frac{1}{2}$) and twelve (12) and twelve and one-half ($12\frac{1}{2}$) of Norman R. Smith's subdivision of the Government Townsite of Port Angeles.

All Tide Lands of the first class in front of the City of Port Angeles, including two tracts lying in front of the United States Hospital Reserve, as shown upon the supplemental map of First Class Tide Lands on file in the office of the Commissioner of Public Lands at Olympia, Washington.

Suburban Lot numbered one and one-half ($1\frac{1}{2}$) of the Government Townsite of Port Angeles.

A 3.16 acre tract in the southwest (SW.) corner of Suburban Lot one (1) of the Government Townsite of Port Angeles.

Division "A" and Division "B" in front of the said Suburban Lot One (1).

Division "A" and Division "B" in front of the said Suburban Lot one and one-half ($1\frac{1}{2}$).

Blocks two (2) and three (3) and the west 320 feet of block four (4) of Port Angeles Tide

Lands of the First Class in front of Syndicate First Addition to the City of Port Angeles, as shown on the plat thereof on file in the office of the Commissioner of Public lands at Olympia, Washington.

Lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), twenty-three (23), twenty-four (24), twenty-five (25), and twenty-six (26), Block two (2), of Cain's Subdivision of Suburban Lot thirty-six (36) of the Government Townsite of Port Angeles.

Lots one (1) and two (2), Block three (3) of Cain's Subdivision of Suburban Lot thirty-six (36) of the Government Townsite of Port Angeles.

All of Block one (1) of Cain's Subdivision of Suburban Lot thirty-six (36) of the Government Townsite of Port Angeles.

Lot one (1), two (2), three (3), four (4) and five (5) of Block four (4) of Cain's Subdivision of Suburban Lot Thirty-six (36) of the Government Townsite of Port Angeles.

All of Blocks one hundred fifty-two (152), one hundred fifty-three (153), one hundred fifty-four (154), one hundred sixty-four (164), one hundred sixty-five (165) and one hundred sixty-six (166) of Frank Chamber's Subdivision of Suburban Lots thirty-seven (37) and a part of thirty-eight (38) of the Government Townsite of Port Angeles. [12]

The northerly seven (7) acres of Suburban Lot twenty-seven (27) of the Government Townsite of Port Angeles.

The east 4.81 acres of Suburban Lot thirty-eight (38) of the Government Townsite of Port Angeles.

(c) Those certain leasehold interests particularly described as follows:

A leasehold interest in the harbor area abutting upon the Port Angeles Tide Lands, Blocks eight and one-half ($8\frac{1}{2}$), eleven and one-half ($11\frac{1}{2}$) and twelve and one-half ($12\frac{1}{2}$), State Lease No. 110.

A leasehold interest in the harbor area lying in front of an unnumbered tract of Port Angeles tide lands lying on the northerly side of Railroad Avenue between Race street and Block Ten and one-half ($10\frac{1}{2}$) of said Port Angeles Tide Lands, said harbor area being bounded by the inner and outer harbor lines, the east line of Race Street and the west line of said Block ten and one-half ($10\frac{1}{2}$) produced across the harbor area to the outer harbor line:

A leasehold interest in the harbor area lying in front of Block ten (10) and one-half ($10\frac{1}{2}$) Port Angeles Tide Lands and bounded by the inner and outer harbor lines and the side lines of said Block ten and one-half ($10\frac{1}{2}$), both produced across the harbor area to the outer harbor line.

All harbor area lying in front of Division B, Block one and one-half ($1\frac{1}{2}$), and Division B,

Block One (1), east of Ennis Creek Waterway, Port Angeles Tide Lands, and Block one (1), Port Angeles Tide Lands in front of Syndicate First Addition, said harbor area being bounded by the inner and outer harbor lines, the easterly line of Ennie Creek across the harbor area to the outer harbor line.

A leasehold interest in the harbor area lying in front of Blocks Two (2) and Three (3), Port Angeles tide lands in front of Syndicate First Addition, said harbor area being bounded by the inner and the outer harbor lines and the side lines of said Blocks two (2) and three (3), both produced across the harbor area to the outer harbor line.

All as shown on the supplemental map of Port Angeles Tide Lands on File in the office of the Commissioner of Pubic Lands at Olympia, Washington. [13]

(d) Those certain tracts of land with the improvements thereon described as follows:

Lots One (1) Two (2), three (3) and four (4), block three (3) of Cain's Subdivision of Suburban Lot twenty-one (21) of the Government Townsite of Port Angeles, according to the duly recorded plat thereof on file in the records of Clallam County, Washington, and improvements.

(e) All the following described lands and all timber thereon:

Lot three (3);

The northeast quarter (NE. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$); the north half (N. $\frac{1}{2}$) of the northeast quarter (NE. $\frac{1}{4}$); and the southwest quarter (SW. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), and the southeast quarter (SE. $\frac{1}{4}$) of the northwest quarter (NE. $\frac{1}{4}$) of section twenty-six (26) township thirty (30) north, range thirteen (13) west, Willamette Meridian.

Lots three (3) and four (4) section twenty-five (25) township thirty (30) north, range thirteen (13) west, Willamette Meridian.

The west half (W. $\frac{1}{2}$) of the southwest quarter (SE. $\frac{1}{4}$) of section sixteen (16), township thirty (30) north, range thirteen (13) west, Willamette Meridian.

Lots five (5), six (6) and seven (7) of section four (4) township thirty (30) north, range thirteen (13) west, Willamette Meridian.

The east half (E. $\frac{1}{2}$) of the southwest quarter (SW. $\frac{1}{4}$) of section twenty (20) township twenty-nine (29) north, range thirteen (13) west, Willamette Meridian.

Lot two (2) and three (3), section nineteen (19) township thirty (30) north, range twelve (12) west, Willamette Meridian.

Lot four (4), section eighteen (18), township thirty (30) north, range twelve (12) west, Willamette Meridian.

The north half (N. $\frac{1}{2}$) of the southwest quarter (SW. $\frac{1}{4}$) of section twelve (12), township twenty-nine (29) north, range thirteen (13) west, Willamette Meridian.

The northeast quarter (NE. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$) of section eleven (11), township twenty-nine (29) north, range thirteen (13) west, Willamette Meridian. [14]

(f) All standing timber on the following described lands:

The Northeast quarter (NE. $\frac{1}{4}$) of the southeast quarter (SE. $\frac{1}{4}$) and the west half (W. $\frac{1}{2}$) of the southwest quarter (SW. $\frac{1}{4}$) of section twenty-four (24), township thirty (30) north, range thirteen (13) west.

Lot three (3) and the northeast quarter (NE. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$) of section eighteen (18), township thirty (30) north, range twelve (12) west, Willamette Meridian.

The east half (E. $\frac{1}{2}$) of the southeast quarter (SE. $\frac{1}{4}$) of section thirteen (13), township thirty (30) north, range thirteen (13) west, Willamette Meridian.

(g) All of the following personal property situated in the COUNTY OF CLALLAM AND STATE OF WASHINGTON:

All steel rails, camp cars, lumber and timbers, switches, locomotives, tender and caboose, brick and tile, and all furniture and fixtures standing in the name of the plaintiffs.

VIII.

By the provisions of the Act of Congress approved July 9, 1918, the Director of Aircraft Production of the United States Government was authorized, whenever in his judgment it would

facilitate the production of aircraft, aircraft equipment or material therefor, for the United States and the governments allied with it in the prosecution of the war, to form, under the laws of the District of Columbia or under the laws of any state, one or more corporations for the purchase, production, manufacture and sale of aircraft, aircraft equipment or materials therefor, and to build, own and operate railroads in connection therewith, said Director being further authorized to acquire on behalf of the United States the capital stock and securities of any corporation so formed by him. The provisions of that act further [15] authorized the Secretary of War, acting through the Director of Aircraft Production, to transfer by appropriate instruments to any such corporation as might be formed thereunder, any interest of the United States in any existing contracts for aircraft, aircraft equipment or materials therefor and the title in lands, plants, railroads or equipment used in or in connection with the production of aircraft, aircraft equipment or materials therefor, on such terms as the Secretary of War, acting through the Director of Aircraft Production, should deem fit. Pursuant to the authority of that Act of Congress, the Director of Aircraft Production caused to be formed under the laws of the State of Washington, the Plaintiff corporation known as the United States Spruce Production Corporation. All of the shares of stock of the said corporation were owned and controlled by the Secretary of War and are the property of the

United States and the corporation is and has at all times since its organization been an arm, agency or instrumentality of the United States Government for the purpose of carrying out the objects and purposes of the said aforesaid acts of Congress. No person, firm or individual has any interest, right, title or estate in or to any shares of stock of that corporation, or in or to any property owned or held by that corporation, and all of its functions as a corporation are exercised by a board of directors named by the Government of the United States and under the directions of the War Department of the Government. [16]

IX.

Prior to the filing of this complaint, the Secretary of War, acting through the Director of Aircraft Production, conveyed and transferred to the plaintiff, United States Spruce Production Corporation, the contract with the Siems, Carey-H. S. Kerbaugh Corporation above referred to, and all of the property and rights of way of the said logging railroad, and since that time the additional rights and properties acquired as herein stated were acquired by the plaintiff corporation under the powers and authority as herein described and for the United States Government.

X.

In the manner described the logging railroad herein referred to and generally known as United States Spruce Production Railroad No. 1 was surveyed, located, and constructed and the rights of way hereinbefore described, and all other prop-

erty herein described, both real and personal, were taken possession of by the plaintiff corporation prior to the year 1919.

XI.

None of the property herein described was assessed or included on the assessment-rolls of Clallam County, Washington, for the years 1919 and 1920, at the time said assessment-rolls were made up. However, at the time the assessment-roll for Clallam County, Washington, was made up for the year 1921, the defendants and particularly the defendant, J. O. Morse, Assessor of Clallam County, Washington, caused to be entered upon the [17] assessment-rolls for said county for the years 1919, 1920 and 1921, all of the property herein described, with assessments for the respective years, and against the various parcels as set forth in paragraph VII of this complaint, as follows:

Parcel (a)	Assessed valuation for 1919,	\$368,144.00
	Assessed valuation for 1920,	368,224.00
	Assessed valuation for 1921,	368,669.00
Parcel (b)	Assessed valuation for 1919,	104,415.00
	Assessed valuation for 1920,	104,405.00
	Assessed valuation for 1921,	107,827.00
Parcel (c)	Assessed valuation for 1919,	710.00
	Assessed valuation for 1920,	710.00
	Assessed valuation for 1921,	710.00
Parcel (d)	Assessed valuation for 1919,	10,820.00
	Assessed valuation for 1920,	10,820.00
	Assessed valuation for 1921,	10,820.00

Parcel (e)	Assessed valuation for 1919,	19,155.00
	Assessed valuation for 1920,	19,870.00
	Assessed valuation for 1921,	20,000.00
Parcel (f)	Assessed valuation for 1919,	6,945.00
	Assessed valuation for 1920,	7,160.00
	Assessed valuation for 1921,	7,160.00
Parcel (g)	Assessed valuation for 1919,	51,987.00
	Assessed valuation for 1920,	51,987.00
	Assessed valuation for 1921,	50,912.00

And during the year 1921, the defendants caused to be entered and charged upon the tax records and rolls of Clallam County, Washington, based upon the assessments above set out, taxes as follows:

Parcel (a)	Taxes charged for the year 1919,	14,034.00
	Taxes charged for the year 1920,	15,308.77
	Taxes charged for the year 1921,	16,439.18
Parcel (b)	Taxes charged for the year 1919,	6,746.53
	Taxes charged for the year 1920,	7,791.98
	Taxes charged for the year 1921,	7,156.47

[18]

Parcel (c)	Taxes charged for the year 1919,	41.83
	Taxes charged for the year 1920,	49.17
	Taxes charged for the year 1921,	43.97
Parcel (d)	Taxes charged for the year 1919,	697.89
	Taxes charged for the year 1920,	806.09
	Taxes charged for the year 1921,	719.53
Parcel (e)	Taxes charged for the year 1919,	667.93
	Taxes charged for the year 1920,	775.32
	Taxes charged for the year 1921,	719.35
Parcel (f)	Taxes charged for the year 1919,	229.19
	Taxes charged for the year 1920,	275.66
	Taxes charged for the year 1921,	247.02

Parcel (g) Taxes charged for the year 1919,	2,454.00
Taxes charged for the year 1920,	2,782.70
Taxes charged for the year 1921,	2,539.21

That the total assessed valuation of the property herein described for the years 1919, 1920, and 1921, and the total taxes charged against said property as made and entered by the defendants, is as follows:

1919, Total Assessed Valuation,	\$562,176.00
1919, Total Taxes,	24,871.37
1920, Total Assessed Valuation,	563,176.00
1920, Total Taxes,	27,789.69
1921, Total Assessed Valuation,	566,098.00
1921, Total Taxes,	27,864.73

That the defendants and each of them claim that the said property herein described was and is taxable for the years 1919, 1920, and 1921, and that the said taxes above set out are now due and payable. That proceedings have been taken by the defendants looking toward the collection of said taxes, and the defendants have notified the plaintiff, that they will distrain all the personal property herein described for the collection of the taxes charged against the same, and have threatened and [19] now threaten to proceed with the collection of all said taxes which are charged against the personal property and make sale thereof in the manner provided for by the laws of the State of Washington, and threaten to and unless restrained by this Court, will proceed to attempt the collection of all of said taxes on all of the real and personal property herein described, and have

threatened to and unless restrained will attempt to make sale of said property, and will undertake to collect penalties on account of pretended delinquencies in the payment of such taxes, and will undertake to deliver possession of said property to purchasers at such sales, all to the great and irreparable injury of the United States of America, and to the plaintiff, United States Spruce Production Corporation.

XII.

That the property herein described was not and is not subject to assessment or taxation for the years of 1919, 1920, or 1921, but the same is exempt therefrom and the taxes entered and charged against said real and personal property, and the plaintiff, United States Spruce Production Corporation, are illegal and void for the reason that the property herein described is in truth and in fact the property of the United States of America, held by and through the plaintiff, United States Spruce Production Corporation, as an agency of the United States of America for the purposes herein set out.

XIII.

That the attempted assessment and taxation of the property herein described by the defendants for the years [20] 1919, 1920 and 1921, constitute clouds upon the title thereto, and by reason of said taxes sought to be levied and charged against said property, the defendants are claiming an interest or right or lien therein adverse to the plaintiff, and this suit is brought for the purpose of determining such interest, claim, right or lien.

The defendants threaten to take further steps looking to the collection of said taxes, which will unless restrained lead to a multiplicity of suits for the reason that attempts will be made to sell said property to third persons and to place them in possession of said property, and the title thereto will be further clouded. The plaintiff, United States Spruce Production Corporation, is in possession by itself of all the said property herein described. Pursuant to the operations of the United States, and under the direction of its officers and agents, and through the instrumentality of the plaintiff, United States Spruce Production Corporation, there was expended by the United States more than one million dollars in the construction of a railroad and the acquisition of the real and personal property herein described, and the said railroad and property herein described is owned and held for Government purposes. The said railroad follows a continuous route upon which has been constructed the tracks of the said railway, together with bridges, culverts and necessary appurtenances, and the whole thereof, together with all the other property, both real and personal, herein described, was and is essential to the said Governmental enterprise, and the segregation by sale for taxes of any part of the said railroad or property herein described would practically result in a destruction of the said railroad for the purpose for which [21] it was so constructed, and would result in irreparable loss and injury to the United States of Amer-

ica and to the plaintiff United States Spruce Production Corporation.

XIV.

That plaintiffs have no plain, adequate or speedy remedy at law.

WHEREFORE, plaintiffs pray that a decree be made adjudging that the attempted assessment and taxation of the property herein described is illegal and void, and that said property is not subject to taxation for the years 1919, 1920, or 1921, in the county of Clallam, State of Washington, and that plaintiffs' title to the property herein described be quieted against any taxes heretofore assessed, levied or charged against said property for the said years, and that the assessments and taxes attempted to be made and charged against said property be removed as clouds upon the title of the plaintiffs, that defendants and each of them be perpetually enjoined from assessing or taxing said property in the county of Clallam, State of Washington, or from attempting to collect said or any taxes for the years 1919, 1920 and 1921.

Plaintiffs further pray that pending the hearing of this cause the defendants and each of them may be restrained from in any way interfering with the plaintiffs' possession and rights in the property herein described, or from taking any steps to collect said taxes, and upon final determination of this suit, that a perpetual injunction may be decreed, and that [22] plaintiffs may have and recover

their costs and disbursements herein, and for such other and further relief as may be proper.

CAREY and KERR,
OMAR C. SPENCER,
Attorneys for Plaintiffs

State of Oregon,
County of Multnomah,—ss.

I, Max Church, being first duly sworn, depose and say that I am secretary of the United States Spruce Production Corporation, plaintiff within named; that I have read the foregoing complaint, and the same is true, as I verily believe.

MAX CHURCH.

Subscribed and sworn to before me, this 30th day of March, 1922.

[Seal] OMAR C. SPENCER,
Notary Public for Oregon.

My commission expires October 30, 1923. [23]

State of Oregon,
County of Multnomah,—ss.

Due service of the within complaint is hereby accepted in Multnomah County, Oregon, this — day of —, 1922, by receiving a copy thereof, duly certified to as such by Omar C. Spencer, of attorneys for plaintiffs.

_____,
Attorneys for Defendants.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 6, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [24]

In the District Court of the United States, for the
Western District of Washington, Northern
Division.

No. 294—E.

UNITED STATES OF AMERICA and UNITED
STATES SPRUCE PRODUCTION COR-
PORATION, a Corporation,

Plaintiffs,

vs.

CLALLAM COUNTY, WASHINGTON, WILL-
IAM A. NELSON, Sheriff of Clallam County,
Washington, E. S. STEWART, Treasurer of
Clallam County, Washington, and J. O.
MORSE, Assessor of Clallam County, Wash-
ington,

Defendants.

Answer.

Come now the defendants above named and an-
swering plaintiffs' complaint, for answer admits,
deny and allege as follows:

I.

Answering the allegations contained in paragraph
I they specifically deny that this is a suit arising
under the laws of the United States; that the United
States is a proper or necessary party to this suit and
that the plaintiff corporation was organized under
any law of the United States; they admit that
the plaintiff United States Spruce Production
Corporation is a corporation organized under
the laws of the State of Washington, and is a citizen

of the State of Washington. They admit the other allegations set forth in said paragraph.

II.

They admit the allegations contained in paragraph II of the complaint, except they deny that the plaintiff corporation was organized under any law of the United States. [25]

III.

In answering the allegations contained in paragraph III they allege that they have not, nor has any of them, knowledge or information sufficient to form a belief as to the matters and things therein set forth.

IV.

They admit the allegations set forth in paragraph IV of the complaint.

V.

In answering the allegations contained in paragraph V defendants and each of them, allege that they have not knowledge or information sufficient to form a belief as to the matters and things therein set forth.

VI.

Answering the allegations contained in paragraph VI they deny that the property and rights therein mentioned were acquired, by, or became the property of the United States. They admit that the title to all of such property, and all property in controversy herein was acquired by the plaintiff United States Spruce Production Corporation and the title to the same has at all times been and now is in said plaintiff.

Further answering the allegations contained in said paragraph they allege that said defendants have not, nor has any of them, knowledge or information sufficient to form a belief as to the matters and things therein set forth.

VII.

Answering the allegations contained in paragraph VII they admit that the property in controversy herein is correctly set forth and described in said paragraph; that the title to all of the same has at all times been and now is in the plaintiff United States Spruce Production Corporation. Answering [26] the other allegations of said paragraphs defendants allege that they have not, nor has any of them, knowledge or information sufficient to form a belief as to the same.

VIII.

They admit all the allegations, matters and things contained and set forth in paragraph VIII from the beginning of said paragraph to the words "should deem fit" found in line 10 of page 15 of the complaint. Answering the other allegations contained in said paragraphs defendants have not, nor has any of them, knowledge or information sufficient to form a belief as to the same.

IX.

Answering the allegations contained in paragraph IX they admit that the plaintiff United States Spruce Production Corporation acquired and has title to all the property therein referred to. As to the other allegations contained in said paragraph the defendants allege that they have not nor has

any of them, knowledge or information sufficient to form a belief as to the same.

X.

Answering the allegations contained in paragraph X they admit that all the properties therein referred to were taken possession of by the plaintiff corporation prior to the year 1919. As to the other allegations in said paragraph defendants have not, nor has any of them, knowledge or information to form a brief as to the same.

XI.

They admit the allegations contained and set forth in paragraph XI of the complaint except they deny that the matters and things therein complained of will be to the great or irreparable [27] injury of the United States of America or of the United States Spruce Production Corporation.

XII.

Defendants deny the allegations contained and set forth in paragraph XII of the complaint.

XIII.

Answering the allegations contained and set forth in paragraph XIII they deny that the taxation therein complained of would constitute a cloud upon the title to the property; they admit that the defendants by reason of the matters and things alleged are claiming an interest and a right and lien adverse to the plaintiff corporation, and that this suit is brought to determine such interest, right and lien; they admit they *they* intend to take steps to collect said taxes in the manner provided by the laws of the State of Washington; they admit that the plaintiff

corporation is in possession of all of said property. They allege that the defendant have not, nor has any of them, knowledge or information sufficient to form a belief as to what, if any amount has been expended by the United States in the matters therein referred to. They specifically deny that the railroad and property therein referred to is owned by or held for governmental purposes. They admit that said railroad has a continuous route as in said paragraph alleged, but denies that the same, together with its appurtenances was or is essential to any government enterprise. They deny that any results will occur other than what must necessarily follow from the collection of taxes. They deny that there will be irreparable loss or injury to either the United States or to Plaintiff corporation. [28]

FOR A SPECIAL AND AFFIRMATIVE DEFENSE these defendants allege:

That the plaintiff, United States Spruce Production Corporation, is the real plaintiff in interest and is a corporation organized and existing under and by virtue of the laws of the State of Washington, that the United States is neither a proper or necessary party; that this suit does not arise under any law of the United States; and that the defendants are all residents of the State of Washington and that this court has no jurisdiction of this action.

FOR A SECOND AFFIRMATIVE DEFENSE and for ground for dismissal of plaintiffs' complaint, these defendants allege that an inspection of plaintiffs' complaint will show that the same does not state facts sufficient to constitute a valid cause

of action in equity against defendants, or any of them, and therefore said complaint should not be maintained but should be dismissed upon its merits.

WHEREFORE defendants pray that plaintiffs take nothing by their action but that the same be dismissed upon its merits and that they be awarded their costs herein

WILLIAM B. RITCHIE,
F. L. PLUMMER,
ELLIS, FLETCHER & EVANS,
Attorneys for Defendants.

United States of America,
State of Washington,
County of Clallam,—ss.

E. S. Stewart, being first duly sworn, on oath deposes and says: He is one of the defendants named in the within and foregoing answer; that he has read said answer, knows the contents thereof and the same is true. That he verifies the same on behalf of all the defendants herein.

E. S. STEWART.

Subscribed and sworn to before me this 19th day of April, [29] A. D. 1922.

[Seal] FRANK L. PLUMMER,
Notary Public in and for the State of Washington,
Residing at Port Angeles therein.

Copy of foregoing answer received and due service thereof accepted this 21st day of April, 1922.

JOHN A. FRATER,
Asst. United States Attorney.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 21, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [30]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN EQUITY—No. 294—E.

UNITED STATES OF AMERICA and UNITED
STATES SPRUCE PRODUCTION COR-
PORATION, a Corporation,

Plaintiffs,

vs.

CLALLAM COUNTY, WASHINGTON,

Defendants.

Decision.

Filed June 28, 1922.

The bill of complaint alleges in substance, that pursuant to laws of the United States the President authorized the purchase of spruce and fir lumber, etc., as war material, and the construction of aircraft for use in the Army and Navy, under the direction of the Chief Signal Officer of the United States Army, also authorized plans for the production for such war material, including the building of railroads; that, the President was authorized to purchase, manufacture, maintain, and operate aerial machines and the acquisition and development of

plants and factories and establishments for the manufacture of aeroplanes, etc., and for the purpose of carrying into effect such directions and authority, \$640,000,000 was appropriated; that, pursuant to congressional authority the President, in order to facilitate the production of such war material, undertook the construction of certain logging railroads through the agency of the Signal corps, Advance Section of the United States Army, and later, by the Bureau of Aircraft Production, Spruce Production Division of the United States War Department (the agency through which the power thus vested was exercised, and the property in issue acquired); that, pursuant to law acting through some of the agencies named, the United States entered into a contract for the construction of the railroad referred to, and acquisition for rights of way therefor; that, pursuant to the Act of July 9, 1918, as amended, the director of Aircraft Production for the purpose of facilitating aircraft material, etc., production formed under [31] the laws of the State of Washington, the United States Spruce Production Corporation; that, all of the shares of stock of said corporation, were subscribed for and owned and controlled by the Secretary of War, and are the property of the United States; that said corporation since its organization has been an agency or instrumentality of the United States Government for the purpose of carrying out the object and purpose of said act of Congress, and that all the functions of such corporation are exercised by a Board of Directors named by the Gov-

ernment of the United States; that, said property was conveyed to the United States Spruce Production Corporation, and that the said corporation went into possession prior to the year 1919; that, in the year 1921 the defendants caused to be entered upon the tax rolls for defendant county for the years 1919, 1920, and 1921, all the property set out for assessment for the respective years; that, the defendants claim the property is taxable for the said years and that the said taxes are now due and payable, and have taken steps to collect the same. It is then alleged that the said property is exempt from taxes and that such assessment is illegal and void. The defendants have moved to dismiss on the ground that the United States is not a proper or necessary party, and therefore no diversity of citizenship is present. In harmony with the holding of this court in *U. S. vs. Sears, et al.*, not reported, the United States is a proper party. The motion to dismiss is therefore denied. The defendants also take issue with the contention on the merits. Upon the trial the allegations set out in the bill of complaint have been substantially sustained.

THOS. P. REVELLE, U. S. Attorney, JOHN A. FRATER, Asst. U. S. Attorney, and CHARLES H. CAREY, Attorneys for the United States.

ELLIS, FLETCHER & EVANS, W. B. RITCHIE, and T. F. TRUMBULL, Attorneys for the Defendant.

NETERER, D. J.—The railroad in issue was constructed as an instrumentality of the Govern-

ment as a war necessity, and was not engaged in commercial business, or the business of a common carrier; [32] and all the activities of the said corporation since the signing of the Armistice have been with the view of winding up its business. The issue concisely stated is: Was the plaintiff corporation a mere instrumentality of the United States in carrying forward preparations to facilitate the prosecution of the war, or is it a corporate entity which stripped the interest of the United States of Beneficial use within the purview of the taxation inhibitions of the law?

By the National Defense Act, Sec. 3115-1/32A.

“For the purpose of expanding and co-ordinating the industrial activities relating to aircraft, or parts of aircraft, produced for any purpose in the United States, and to facilitate generally the development of air service, a board is hereby created, to be known as the Aircraft Board. * * * ”

Sec. 3115-1/32 B.

“The board shall * * * include a civilian chairman, the Chief Signal Officer of the Army, and two other officers of the Army to be appointed by the Secretary of War. The Chief Constructor of the Navy and two other officers of the Navy to be appointed by the Secretary of the Navy; and two additional civilian members. The Chairman and civilian members shall be appointed by the President by and with the advice and consent of the Senate.”

Sec. 3115-1/32 D.

“The Board is hereby empowered under the direction and control of the * * * Secretary of War to supervise and direct * * * production and manufacture of aircraft. * * * ”

Sec. 3115 1/32 E. The Board is empowered to employ such clerks and employees as may be necessary, and for the purpose of paying the expenses provided by law, \$100,000 of an appropriation made for the Signal Corps of the Army is made available. By Act of June 3, 1916, making further provisions for National Defense, sec. 120, p. 213, Stat. 39, the President in time of War or when war is eminent is empowered through any head of the department of the Government to place with any concern an order for material as may be required, and compliance with such order is made obligatory, and a penalty provided for noncompliance, and by Act Approved March 4, 1917, 39 Stat. p. 1192, \$115,000,000 as may be necessary was made immediately available for expeditious construction of [33] aircraft, etc. By Act of July 24, 1917, Chapter 4, Sec. 9, 40 Stat. 245, authority is given to the President for emergency purchase, manufacture, building, etc., of motor vehicles, aviation stations, roads, etc., through the department, and by Sec. 8, of the Act, all officers and enlisted men of the temporary forces of the Signal Corps including the aviation section are placed in the same footing as to pay, allowance, and pension, as permanent officers and enlisted men of corresponding grades, and length of service in the regular army. By this act (Sec. 1) the Signal corps

and Aviation Section are temporarily increased. Clearly all functions were a public necessity, and for public use, and all property acquired was for such purpose.

At the outset it may be said that the case recently decided by the Supreme Court, United States Shipping Board Emergency Fleet Corporation vs. Sloan Ship Yard Corporation, May 1, 1922, has no application. That case had relation to a rule of conduct and responsibility therefor, and held that the agent "does not cease to be answerable for his acts." The issue here is ownership by the United States, or property reserved for public use, and the manner in which it is held would appear to be of little consequence, when the charge against the property is not created by some act of the corporation. Freedom of corporate action or power of control by the Spruce Production Corporation in this case is mere fiction. All of its acts were directed and controlled by the President of the United States through the several departments authorized by the Congress; and the claim is not predicated upon any act of omission or of commission, and the corporation was a mere instrumentality or agency for doing the bidding of the President of the United States. *Chicago Mil. St. P. Ry. Co. vs. Minn. C. Asso.*, 247 U. S. 490, at 97. Courts will not be blinded by the form of law. *Cleveland-Cliffs Iron Co. vs. Arctic Iron Co.* 261 Fed. 15. The Liability asserted is one sought to be imposed by statute, and not one created by contract or tortious act of the corporate entity. The Supreme Court in the *Pine Hill Coal Co. vs.*

U. S. Decided May 29, 1922, said: "Liability in any case is not to be imposed upon a Government without clear words." The contention of the defendants that a tax upon the operation or right to function of the corporation has a necessary effect of impairing [34] the power to serve, and is prohibited; but that a local tax upon the property which does not directly affect its operations to function is not prohibited, unless the exception is expressly declared, I do not think can be obtained here in the sense asserted to the existing facts. The cases cited in support have not application for the reason that the parties in the cited cases were functioning as common carriers or commercial enterprises, and the interest of the Government was an agreement to perform in its behalf and benefit by the parties in emergency of war, or contingency named on demand. Whereas, in the instant case the property is the property of the United States held in the name of the corporation, and has not been used in other than for war purposes. No question of innocent parties can enter, and the court must disregard the corporate form for the purpose of justice to ascertain the right and true relation. *U. S. vs. Beebe*, 127 U. S. 338, at 334. The relation of the United States to the corporation must be determined by the purpose and act creating it, and the uses to which the property is to be devoted. Chief Justice Marshall in the *Dartmouth College Case*, 4 Wheat. (17 U. S.) 518, at 561 said:

"To determine the character of a corporation the beneficial purposes to which the prop-

erty of the corporation is to be used may be considered.

Justice McKenna, for the Court in *McCaskill vs. U. S.* 216 U. S. 504, at 514, said:

“Undoubtedly a corporation is in law a person or entity entirely distinct from its stockholders and officers.”

And on page 515 says:

“A growing tendency is therefore exhibited in the courts to look beyond the corporate form to the purpose of it, and to the officers who are identified with that purpose.”

The object and manner and purpose of organization and operation are conclusively established to be to expedite efficiency in the production of aircraft, etc., material for war purposes, and when it is determined that the property is held for a public purpose the right to exemption applies. Sec. 4, Sub. 2, enabling Act, and Art. 26, of the Constitution of Washington provide:

“That no taxation shall be imposed by the State on land or property therein belonging to, or which may be thereafter purchased by the United States or reserved for use.”

This is conceded to be but declaratory of the rule. In *McCullough vs. Maryland*, 4 Wheat. 416 (17 U. S.), in substance it was held that neither the property of the United States, nor any instrumentality in carrying [35] forward its lawful powers may be taxed by a state, and this rule has not been departed from. In *Page vs. Pierce County*, 25 Wash. 6, the State Supreme Court held that the State may

not tax land in which the United States retains the right of control, and this was not changed in *State vs. Wiles*, 16 Wash. Dec. 297, where the defendant was rendering a service to the United States by carrying mail, for which service he used a truck, of which he was owner. This truck was clearly not within the exemption provision any more than would be all vessels or trains carrying United States mail: The defendant was under contract with the United States. In the instant case the corporation was not under contract to perform for the United States, but the United States was acting in its own behalf through the Spruce Corporation, as a facility to expedite efficiency, and the corporation as an entity did not function in the sense of having freedom of action or power of control.

The issue has been presented with masterful ability, and the research of counsel has, I think, exhausted the subject. An examination of all the cases, the constitutional provisions of the State and the rule conceded applicable to Government property considered, leads to the conclusion that the property is exempt from taxation. No case has been presented, nor have I found one where the property of the Government administered through a corporation in executing a wholly Federal employment is subject to taxation. In the instant case the property itself is also the only means and instrumentality by which the purpose and employment could be carried out, and to tax it would be to destroy it. A review here of the cases cited would

not serve any useful purpose. Decree for the plaintiff.

NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. June 20, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [36]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN EQUITY—No. 249—E.

UNITED STATES OF AMERICA and UNITED
STATES SPRUCE PRODUCTION COR-
PORATION, a Corporation,

Plaintiffs,

vs.

CLALLAM COUNTY, WASHINGTON, WILL-
IAM A. NELSON, Sheriff of Clallam
County, Washington, E. S. STEWART,
Treasurer of Clallam County, Washington,
and J. O. MORSE, Assessor of Clallam
County, Washington,

Defendants.

Decree.

This cause having heretofore been submitted upon the evidence in behalf of the respective parties and upon argument of counsel and the Court being

advised and having made and filed its written decision it is now,

ORDERED AND DECREED that the attempted assessment and taxation of the property described in the complaint is illegal and void and the said property is not subject to taxation for the years 1919, 1920 and 1921 in the county of Clallam, State of Washington, and that the plaintiff's title to the said property be quieted against any and all taxes heretofore assessed, levied or charged against the said property for the said years, and also that the attempted assessment of taxes against the said property be and is hereby removed as a cloud upon the title of the plaintiffs and also that the defendants and each of them be and are hereby perpetually enjoined from assessing or taxing the said property or from attempting to collect the said or any tax for the said years, and that the plaintiffs have and recover of and from the defendants their costs and disbursements [37] herein. To the entry of this decree the defendants except and exception is noted.

JEREMIAH NETERER,

Judge.

Dated Aug. 18th, 1922.

By agreement of parties time to file and serve bill of exceptions is extended to Oct. 1st, 1922.

Aug. 18, 1922.

JEREMIAH NETERER,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Aug. 18, 1922. F. M. Harshberger,
Clerk. By S. E. Leitch, Deputy. [38]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN EQUITY—No. 294—E.

UNITED STATES OF AMERICA and UNITED
STATES SPRUCE PRODUCTION COR-
PORATION, a Corporation,

Plaintiffs,

vs.

CLALLAM COUNTY, WASHINGTON, WILL-
IAM A. NELSON, Sheriff of Clallam
County, Washington, E. S. STEWART,
Treasurer of Clallam County, Washington,
and J. C. MORSE, Assessor of Clallam
County, Washington,

Defendants.

Assignment of Errors.

Now come the defendants in the above-entitled
cause, and file the following assignment of errors
upon which they will rely upon their prosecution
of the appeal in the above-entitled cause, from the
decree made by the United States District Court
for the Western District of Washington, Northern
Division, on the 18th day of August, A. D. 1922.

I.

Said Court erred in refusing to sustain the first

special and affirmative defense contained in the answer to these defendants to the effect that all the real parties to this action, both plaintiff and defendant, are residents of the State of Washington, and that said Court has no jurisdiction of this action.

II.

Said Court erred in refusing to sustain the objection [39] of these defendants to the jurisdiction of said court of this cause interposed by these defendants at the opening of the trial on the ground that the United States is neither a necessary nor a proper party, and that the cause of action does not arise under the constitution nor any law of the United States.

III.

Said Court erred in refusing to sustain the motion of these defendants to dismiss this action, interposed at the close of the trial upon the ground that said Court had no jurisdiction in that the United States is neither a necessary nor a proper party and that the cause of action does not arise under the constitution of the United States nor under any law of the United States, and that this action is a suit between citizens of the same state.

IV.

Said Court erred in entertaining jurisdiction of said cause and in refusing to dismiss said cause on the ground that said court had no jurisdiction to entertain the same.

V.

Said Court erred in refusing to sustain the second

affirmative defense contained in the answer of these defendants to the effect that the plaintiffs' complaint does not state facts sufficient to constitute a valid cause of action in equity against these defendants or any of them.

VI.

Said Court erred in refusing to sustain the motion of these defendants interposed at the close of the trial for the dismissal of this action upon the merits, on the ground that the [40] plaintiffs' complaint does not state facts sufficient to constitute a cause of action, and does not state facts entitling the plaintiff to the relief sought or to any relief whatever.

VII.

Said Court erred in refusing to dismiss this action on the ground that the plaintiffs' complaint does not state any facts sufficient to constitute a valid cause of action in equity against these defendants or either of them.

VIII.

Said Court erred in refusing to sustain the further motion of these defendants interposed at the close of the evidence for the dismissal of this action on the ground that the evidence adduced at the trial fails to show any cause of action and fails to show that the plaintiffs are entitled to the relief sought or to any relief whatever.

IX.

Said Court erred in refusing to dismiss this action on the ground that the evidence adduced at the trial failed to prove any cause of action and

failed to show that the plaintiffs are entitled to the relief sought or to any relief whatever.

X.

Said Court erred in entering a decree granting to plaintiffs any relief whatsoever in this action and in entertaining the decree of August 18, 1922, holding invalid the taxes levied and assessed by Clallam County, Washington, against the property of the plaintiff, United States Spruce Production Corporation, situated in Clallam County, and in enjoining the enforcement and collection of said taxes or any of the same, and in entering any other decree than a decree dismissing [41] this action with costs against the plaintiff.

WHEREFORE the appellants pray that said decree be reversed, and that said District Court for the Western District of Washington, Northern Division, be ordered to enter a decree dismissing this cause on the merits with costs against the plaintiffs.

WM. B. RITCHIE,
T. F. TRUMBULL,
ELLIS, FLETCHER & EVANS,
Attorneys for Appellants.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 10, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [42]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 294—E.

UNITED STATES OF AMERICA and UNITED
STATES SPRUCE PRODUCTION COR-
PORATION, a Corporation,

Plaintiffs,

vs.

CLALLAM COUNTY, WASHINGTON, WILL-
IAM A. NELSON, Sheriff of Clallam
County, Washington, E. S. STEWART,
Treasurer of Clallam County, Washington,
and J. O. MORSE, Assessor of Clallam
County, Washington,

Defendants.

Petition for Appeal.

To the Honorable JEREMIAH NETERER, United
States District Judge, for the Western District
of Washington, Northern Division.

The above-named defendants, feeling themselves
aggrieved by the decree made and entered in this
cause on the 18th day of August, 1922, does hereby
appeal from said decree, to the United States Circuit
Court of Appeals for the Ninth Circuit for the rea-
sons specified in the assignment of errors which is
filed herewith, and said defendants pray that their
appeal be allowed, and that citation issue as provided
by law, and that a transcript of the record, proceed-
ings, and papers upon which said decree was based,

duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, and your petitioners further pray, that the proper Order, touching the security to be required of them to perfect their appeal be made. [43]

Dated at Seattle, Washington, this 10th day of October, A. D. 1922.

WM. B. RITCHIE,
County Attorney,
ELLIS, FLETCHER & EVANS,
T. F. TRUMBULL,
Attorneys for Defendants.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 10, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [44]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 294—E.

UNITED STATES OF AMERICA and UNITED
STATES SPRUCE PRODUCTION COR-
PORATION, a Corporation,
Plaintiffs,

vs.

CLALLAM COUNTY, WASHINGTON, and
WILLIAM A. NELSON, Sheriff of Callam

County, Washington, E. S. STEWART,
Treasurer of Clallam County, Washington,
and J. O. MORSE, Assessor of Clallam
County, Washington,

Defendants.

**Order Allowing Appeal and Fixing Amount
of Bond.**

NOW, on this 10th day of October, 1922, this cause came on to be heard, upon the petition of the defendants, above named, for an appeal herein, and the Court being advised in the premises,—

IT IS ORDERED that the appeal of said petitioners in said matter, to the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby allowed, and that a certified transcript of the record, proceedings, orders, decrees and testimony, and all of the other proceedings in said matter, be transferred to the United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED, that the bond on the appeal of the said petitioners be fixed in the sum of five hundred dollars, to cover all damages and costs if the said appellant shall fail to make their appeal good. [45]

Done in open court, this 10th day of October,
A. D. 1922.

JEREMIAH NETERER,

Judge of the United States District Court, Western
District of Washington, Northern Division.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 10, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [46]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 249—E.

UNITED STATES OF AMERICA and UNITED
STATES SPRUCE PRODUCTION COR-
PORATION, a Corporation,

Plaintiffs,

vs.

CLALLAM COUNTY, WASHINGTON, WILL-
IAM A. NELSON, Sheriff of Clallam
County, Washington, E. S. STEWART,
Treasurer of Clallam County, Washington,
and J. O. MORSE, Assessor of Clallam
County, Washington,

Defendants.

Appeal Bond.

KNOW ALL MEN BY THESE PRESENTS,
that we, Clallam County, Washington, William A.
Nelson, sheriff of Clallam County, Washington,
E. S. Stewart, Treasurer of Clallam County, Wash-
ington, and J. O. Morse, Assessor of Clallam

County, Washington, as principals, and United States Fidelity and Guaranty Co., as surety, acknowledge ourselves to be jointly indebted to the United States of America and the United States Spruce Production Corporation, a corporation Appellee, in the above-entitled cause, in the sum of Five Hundred and no/100 (\$500.00) Dollars, conditioned that;

WHEREAS, on the 18th day of August, 1922, in the United States District Court, for the Western District of Washington, Northern Division, in a suit depending in that court, wherein the United States of America and the United States Spruce Production Corporation, a corporation, were plaintiffs, and [47] Clallam County, Washington, William A. Nelson, Sheriff of Clallam County, Washington, E. S. Stewart, Treasurer of Clallam County, Washington, and J. O. Morse, Assessor of Clallam County, Washington, were defendants, numbered 294-E on the Equity Docket of said court, a decree was rendered against the said defendants, and the said defendants have obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the court, to reverse said decree;

NOW, if the said defendants shall perfect their appeal to effect, and answer all costs if it fails to make their appeal good, then the above obligation

to be void; otherwise to remain in full force and virtue.

CLALLAM COUNTY, WASHINGTON.

By THEO. F. RIXON,

Chairman Board of County Commissioners.

UNITED STATES FIDELITY AND
GUARANTY CO.

[Corporate Seal]

· D. H. McCOLLISTER,
 Attorney in Fact,
 Surety.

Approved as to form and sufficiency of security,
this 10th day of October, 1922.

JEREMIAH NETERER,

Judge, United States District Court, Western Dis-
trict of Washington, Northern Division. [48]

[Indorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. Oct. 10, 1922. F. M. Harshberger, Clerk.
By S. E. Leitch, Deputy. [49]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 294—E.

UNITED STATES OF AMERICA and UNITED
STATES SPRUCE PRODUCTION COR-
PORATION, a Corporation,

Plaintiffs,

vs.

CLALLAM COUNTY, WASHINGTON, WILL-
IAM A. NELSON, Sheriff of Clallam
County, Washington, E. S. STEWART,
Treasurer of Clallam County, Washington,
and J. O. MORSE, Assessor of Clallam
County, Washington,

Defendants.

Stipulation Re Forwarding of Original Exhibits.

IT IS HEREBY STIPULATED AND
AGREED, by and between the plaintiffs and the
defendants, by their respective counsel, that the
Judge of the above-entitled court, and before whom
this cause was tried, may enter an order herein,
directing that the original exhibits introduced in
evidence in this cause shall be sent up to the Cir-
cuit Court of Appeals in lieu of printed copies
thereof, and that it shall not be necessary that such
exhibits be printed.

Dated at Seattle, Washington, this 9th day of
October, A. D. 1922.

CAREY & KERR,
THOS. P. REVELLE,
JOHN A. FRATER,

Attorneys for Defendants.

WM. B. RITCHIE,

County Atty.,

ELLIS, FLETCHER & EVANS and
T. F. TRUMBULL,

Attorneys for Defendant.

Approved:

NETERER,
Judge. [50]

[Indorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. Oct. 9, 1922. F. M. Harshberger, Clerk.
By S. E. Leitch, Deputy. [51]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 294—E.

UNITED STATES OF AMERICA and UNITED
STATES SPRUCE PRODUCTION COR-
PORATION, a Corporation,
Plaintiffs,

vs.

CLALLAM COUNTY, WASHINGTON, WILL-
IAM A. NELSON, Sheriff of Clallam

County, Washington, E. S. STEWART,
Treasurer of Clallam County, Washington,
and J. O. MORSE, Assessor of Clallam
County, Washington,

Defendants.

**Notice of Presentation of Statement of Evidence
for Approval.**

To the Above-named Plaintiffs and to THOMAS T.
REVELLE, United States Attorney, JOHN
A. FRATER, Assistant United States Attorney,
and to the Messrs. CAREY & KERR and
OMAR C. SPENCER, Attorneys for the Plain-
tiffs.

You. and each of you are hereby notified, that
the above-named defendants has heretofore on the
22d day of September, 1922, lodged in the office of
the clerk of the United States District Court, for
the Western District of Washington, Northern
Division, at Seattle, Washington, for your examina-
tion, a statement of the evidence in the above-enti-
tled cause, and of the facts occurring at the trial
thereof, for certification on the appeal of the de-
fendants from the final judgment rendered therein
by said court, on the 18th day of August, 1922, to
the Circuit Court of Appeals for the Ninth Circuit.
[52]

AND YOU ARE FURTHER NOTIFIED, that
the defendants will, at 10 o'clock A. M., on the 9th
day of October, 1922, at the courtroom of the said
United States District Court, at Seattle, Washing-
ton, ask the Honorable Jeremiah Neterer, Judge of

said court, before whom the said cause was tried, to approve said statement.

WM. B. RITCHIE,

County Attorney,

ELLIS, FLETCHER & EVANS,

T. F. TRUMBULL,

Attorneys for Defendants.

Service of the foregoing notice accepted by receipt of copy admitted this 22d day of September, A. D. 1922.

THOS. P. REVELLE,

JOHN A. FRATER,

CAREY & KERR,

Attorneys for Plaintiffs.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 22, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [53]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 294—E.

UNITED STATES OF AMERICA and UNITED
STATES SPRUCE PRODUCTION COR-
PORATION, a Corporation,

Plaintiffs,

vs.

CLALLAM COUNTY, WASHINGTON, WILL-
IAM A. NELSON, Sheriff of Clallam

County, Washington, E. S. STEWART,
Treasurer of Clallam County, Washington,
and J. O. MORSE, Assessor of Clallam
County, Washington,

Defendants.

**Order Approving Statement of the Evidence on
Appeal.**

The following is a true, complete, and properly prepared statement of the substance of all the testimony introduced and admitted upon the trial of the above-entitled cause, in the United States District Court for the Western District of Washington, Northern Division, and together with the original exhibits therein and herein referred to and hereby made a part of said statement, constitute all of the evidence and exhibits, introduced and admitted in evidence upon said trial, essential to the decision of the questions presented by the appeal heretofore petitioned for herein by the defendants and allowed from the final judgment in this cause, and the foregoing statement contains all objections and exceptions made or taken to the admission and exclusion of evidence, and to all motions and rulings thereon made, in said District Court at said trial, and said statement is hereby approved.

The exhibits which were introduced and admitted in evidence upon said trial and which are hereby made a part [54] of this statement are the exhibits filed with the clerk of said District Court in the trial of this cause and marked by him respectively as follows:

1. Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32.
2. Defendant's Exhibits "A," "B," "C."
3. Balance Sheet of the United States Spruce Production Corporation dated December 31st, 1919, to be supplied by plaintiffs.

Dated at Seattle, Washington, this 9th day of Oct., A. D. 1922.

JEREMIAH NETERER,
Judge.

O. K.—JOHN A. FRATER,
Assistant United States Attorney. [55]

In the District Court of the United States for
the Western District of Washington, North-
ern Division.

No. 294—E.

UNITED STATES OF AMERICA and UNITED
STATES SPRUCE PRODUCTION COR-
PORATION,

Plaintiffs,

vs.

CLALLAM COUNTY, WASHINGTON, WILL-
IAM A. NELSON, Sheriff of Clallam County,
Washington, E. S. STEWART, Treasurer of
Clallam County, Washington, and J. O.
MORSE, Assessor of Clallam County, Wash-
ington,

Defendants.

Statement of the Evidence.

STATEMENT OF FACTS Occurring at the Trial of the Above-entitled Cause, Proposed by the Defendant, for Certification on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

BE IT REMEMBERED, that the above-entitled cause came on regularly for trial, in the above-entitled court, before the Honorable Jeremiah Neterer, Judge of the said Court, sitting in Equity, at Seattle, Washington, on the 15th day of June, 1922, at the hour of 11 o'clock A. M., of said day, the respective parties being represented as follows:

The United States of America, and the United States Spruce Production Corporation, plaintiffs, being represented by John Frater Esquire, Assistant United States District Attorney, and Messrs. Carey & Kerr,

And the defendants, Clallam County, Washington, William A. Nelson, Sheriff of Clallam County Washington, E. S. Stewart, Treasurer of Clallam County Washington, and J. O. Morse [56] Assessor of Clallam County Washington, by W. B. Ritchie, Esquire, County Attorney for Clallam County, Messrs. Ellis, Fletcher & Evans, and T. F. Trumbull, Esquire.

THAT THEREUPON, counsel for the defendants objected to the jurisdiction of the Court, and moved the Court to dismiss the action on the following grounds, to wit:

1st. That the United States of America is neither a necessary nor a proper party to the suit.

2d. That the cause of action does not arise under the Constitution or any law of the United States.

3d. That there is no disputed construction of the laws of the United States.

Counsel for the defendants, then stated that the motion and objection was made in all good faith, and that defendants intended to rely and insist upon it, but suggested, that if agreeable to the Court and counsel, that the motion and objection be taken under advisement and decision thereon reserved by the Court, subject to the introduction of testimony.

It being agreeable to counsel for the plaintiffs, the Court announced that its ruling upon the motion and objection of the defendants, would be reserved, and its decision given at the time of the closing of the case.

The statement of the issues involved was then made by the attorneys for the respective parties, and thereupon the following testimony was introduced on behalf of the plaintiff.

Testimony of Max Church, for Plaintiff.

MAX CHURCH, called as a witness on behalf of plaintiff, was sworn and testified as follows:

“I am a resident of Portland Oregon, and I am the [57] Secretary of the United States Spruce Production Corporation. My office is in the city of Portland but the principal office and place of

(Testimony of Max Church.)

business of the corporation is in the city of Vancouver, Washington. The office at Portland is a branch office. As secretary of the corporation, I have the charge and custody of its records, papers, and books. Lieutenant-Colonel Charles Van Way is the President of the Corporation, and Lieutenant-Colonel Van Way, Lieutenant-Colonel Fuller and Charles H. Carey, constitute the Board of Trustees. Lieutenant-Colonel Fuller is comptroller and treasurer. These constitute the officers of the corporation, except an assistant Treasurer and Cashier. The Articles of Incorporation of the United States Spruce Production Corporation have been amended four times and I have with me certified copies of the original and amended Articles of Incorporation.

Thereupon Plaintiff's Exhibit No. 1, consisting of the Original Articles of Incorporation, with the amendments was introduced in evidence and admitted without objection. The witness then continued as follows:

"The by-laws of the corporation have been amended from time to time and I have with me the original by-laws and the amendments thereto.

Thereupon Plaintiff's Exhibit No. 2, being the original by-laws of the United States Spruce Production Corporation was introduced in evidence and admitted, without objection.

The witness then produced and identified the records [58] of the proceedings and minutes of the corporation, and stated that he had made copies

(Testimony of Max Church.)

of such portions of the said record as was deemed material by plaintiffs.

Thereupon Plaintiff's Exhibit No. 3, being a copy of the records of the first meeting of the incorporators of the United States Spruce Production Corporation, was introduced and admitted without objection. The witness then continued as follows:

I have prepared a copy of the original Stock subscription, which I now produce.

Thereupon Plaintiff's Exhibit No. 4, being a copy of the Stock Subscription of the United States Spruce Production Corporation, was introduced in evidence, and admitted without objection. Continuing, the witness states:

Colonel Disque subscribed for the 99,993 shares in the corporation, in the name of the United States of America, by John D. Ryan, Director of Aircraft Production, pursuant to instructions contained in a telegram, addressed to Colonel Disque by John D. Ryan, authorizing him to subscribe for 99,993 shares of the capital stock of the corporation, which telegram is a part of the records of my office and a copy of which I produce.

Thereupon Plaintiff's Exhibit No. 5, consisting of a copy of telegram, was introduced in evidence, and admitted without objection. Continuing the witness stated:

I have a copy of the records of the first meeting of the Stockholders of the corporation, together

(Testimony of Max Church.)

with consent and waiver of Notice of the meeting [59] attached, which I now produce.

Thereupon Plaintiff's Exhibit No. 6, was introduced in evidence and admitted without objection. Continuing the witness stated:

I have in my records, a proxy from John D. Ryan Director of Aircraft Production, to Bryce P. Disque and I now produce a copy of the same.

Thereupon Plaintiff's Exhibit No. 7, being a certified copy of the proxy of John D. Ryan to Bryce P. Disque, was introduced in evidence and admitted without objection. Continuing the witness stated:

I have prepared copies of the minutes of the first meeting of the Board of Trustees of the Corporation, which I now produce.

Thereupon Plaintiff's Exhibit No. 8, being a copy of the minutes of the first meeting of the Board of Trustees of the United States Spruce Production Corporation, was introduced in evidence, and admitted without objection. The witness continued as follows:

The stock of the corporation was paid for pursuant to the call made at the first meeting of the Board of Trustees. The Director of Aircraft Production caused an amount equal to one percent of the amount of the stock he owned to be transmitted to the corporation, pursuant to that call. My records do not show how the shares that were subscribed by the individual subscribers were paid. At a meeting held October 23d, 1918, an amendment

(Testimony of Max Church.)

to the Articles [60] of the Incorporation of the United States Spruce Production Corporation was adopted.

Thereupon Plaintiff's Exhibit No. 9, being the minutes of the meeting of the Board of Directors, held October 23d 1918, was introduced in evidence and admitted without objection. Continuing the witness stated:

Pursuant to the action of the Board of Directors at the meeting of October 23d 1918, a special meeting of the stockholders was held on November 1st, 1918, at which all of the stock was represented, in person or by proxy, and at that time the Articles of Incorporation were amended in conformity with the suggestion of the Judge Advocate General. I have prepared a copy of the minutes of this meeting which I now produce.

Thereupon Plaintiff's Exhibit No. 10, being the minutes of the meeting of the Stockholders, of the corporation, held November 1st, 1918, was introduced in evidence, and admitted without objection. Continuing the witness stated:

At a meeting of the Board of Trustees, held on September 17th, 1918, certain resolutions were adopted, respecting the proposed saw mill to be located at Port Angeles, and Spruce Production Railroad No. 1. I have prepared copies of the minutes of this meeting which I now produce.

Thereupon Plaintiff's Exhibit No. 11, being a copy of the minutes of the meeting of the Board of Trustees, held [61] September 17th, 1918,

(Testimony of Max Church.)

was introduced in evidence and admitted without objection. Continuing the witness states:

On September 24th, 1918, the Board of Trustees caused the by-laws of the corporation to be amended at the suggestion of the Director of Aircraft Production, and I have prepared a copy of that portion of the minutes covering this matter, which copy I now produce.

Thereupon Plaintiff's Exhibit No 12, being an excerpt from the minutes of the meeting of the Board of Trustees held on September 24th, 1918, was introduced in evidence and admitted without objection. Continuing the witness states:

I have copies of the minutes of the meeting of the Trustees of November 29th, 1918, and also minutes of the meeting of November 14th, 1918, and herewith produce such copies.

Thereupon Plaintiff's Exhibit No. 13, being the minutes of the Trustee's meeting of November 29th, 1918, and Plaintiff's Exhibit No. 14, being minutes of the meeting of Trustees of November 14th, 1918, were introduced in evidence and admitted without objection. Continuing the witness stated:

It appears from my record that upon the signing of the Armistice, which was on the 11th day of November, 1918, notice was sent out to all the contractors who were operating under contracts entered into with the Government, and which contracts had been assumed by the corporation, to discontinue operations, and all contracts were can-

(Testimony of Max Church.)

celled, except a very few, which it was necessary to continue for the time being to preserve the property under construction and with [62] these exceptions all of the operations were terminated, and the corporation thereupon proceeded to take the necessary steps looking to the liquidation and preservation of the assets. The minutes just in evidence (Plaintiff's Exhibits 13 and 14) contain a copy of what was known as General Orders No. 34, and the corporation conformed to that order in the procedure and method adopted by the directors, and this was done under the directions given by John D. Ryan, on November 12th, 1918, to General Disque. John D. Ryan was director of Aircraft Production. Pursuant to the action of the Directors of the corporation an extensive advertising plan was carried on, looking to the sale of these properties on a bid plan, whereby the highest bidder, provided he met a minimum price set by the corporation, for the Government properties, would buy them on that plan. Catalogs were prepared of all the assets both real and personal, as part of the advertising campaign. Reference is made in the minutes to certain debentures, issued by the corporation. These debentures were issued pursuant to directions from the Director of Aircraft Production, and in compliance with such directions the Trustees of the Corporation, authorized the execution of \$25,000,000 of so-called Debenture Certificates of Debenture Bonds, which were issued and delivered to the Registrar therein

(Testimony of Max Church.)

named, for the United States. \$15,000,000 was credited to the Corporation on account of these debentures, and the balance of \$10,000,000 was to be determined, and has been determined by the relative accounts as they [63] stood at the time, the United States Production Corporation succeeded to the Spruce Production Division. These Debentures were owned by the United States of America. The bonds provide that they shall be retired at the time of the liquidation of the assets of the corporation. That they shall draw five per cent per annum interest if such interest is earned by the corporation; and shall be payable out of the net assets of the corporation and not payable unless a sum sufficient, after liquidation, is accumulated to retire them. They are not participating debentures, but are to be paid *pro rata*. I have here one of these debentures which has been cancelled.

Thereupon Plaintiff's Exhibit No. 15, being one of the cancelled debentures of the United States Spruce Production Corporation, was introduced in evidence and admitted without objection. Continuing the witness states:

My records show, that a letter written by Colonel Julian H. Harris of the Signal Corps of the United States Army and Emergency Officer, acting as Legal Advisor to the Air service, to Mr. Ryan, and Dated July 25th, 1918, was the first suggestion of the plan for carrying on governmental operations

(Testimony of Max Church.)

by means of this corporation. This letter I now produce.

Thereupon Plaintiff's Exhibit No. 16, being a letter from Colonel Harris to Mr. Ryan, dated July 25th, 1918, was introduced in evidence and admitted without objection. Continuing [64] the witness stated:

I have here a telegram dated August 8th, 1918, from General Disque to Mr. John D. Ryan, which I now produce.

Thereupon Plaintiff's Exhibit No. 17, being a telegram from General Disque to Mr. Ryan, was introduced in evidence and admitted without objection. Continuing the witness stated:

I have here a letter dated August 19, 1918, from Mr. Ryan to the Secretary of War, which I now produce.

Thereupon Plaintiff's Exhibit No. 18, being a letter from Mr. Ryan to the Secretary of War, was introduced in evidence and admitted without objection. Continuing the witness stated:

I have here a telegram, dated August 19th 1918, to Gen. Disque authorizing him to subscribe for stock in this corporation, which I now produce.

Thereupon Plaintiff's Exhibit No. 19, being a telegram to General Disque, dated August 19, 1918, was introduced in evidence and admitted without objection. Continuing the witness stated:

I have a telegram from General Disque to Mr. Potter, dated September 9th, 1918, which I now produce.

(Testimony of Max Church.)

Thereupon Plaintiff's Exhibit No. 20, being a telegram from General Disque to Mr. Potter, was offered in evidence and admitted without objection. Continuing the witness stated:

I have a telegram from General Disque to Mr. Potter, dated September 24th, 1918, which I now produce. [65]

Whereupon Plaintiff's Exhibit No. 21, being a telegram from General Disque to Mr. Potter, was introduced in evidence and admitted without objection. Continuing the witness stated:

Mr. Potter was acting Director of Aircraft Production of the United States, during the time that Mr. Ryan was in Europe. I have a copy of a letter from Mr. Potter addressed to the Honorable Benedict Crowell, Acting Secretary of War, under date of October 9th, 1918, which I now produce.

Whereupon Plaintiff's Exhibit No. 22, being a letter from Mr. Potter to Crowell, was introduced in evidence and admitted without objection. Continuing the witness stated:

I have here a letter from the Secretary of Agriculture to the Secretary of War, dated Jan. 24th, 1920, and produce the same.

Whereupon Plaintiff's Exhibit No. 23, being a letter from the Secretary of Agriculture to the Secretary of War, was introduced in evidence and admitted without objection. Continuing the witness stated:

The corporation was organized in August, 1918, and from that date until November 11th, 1918,

(Testimony of Max Church.)

upon the signing of the Armistice, its activities were directed to the Government's program for the production of aeroplane lumber. After the signing of the Armistice, its activities were directed to the salvaging of its assets, converting them into money and winding up its business, liquidating its assets and otherwise getting [66] ready to dissolve. After the Armistice there were no operations carried on not directly concerned with the winding up and liquidation of the corporation's business and its assets. The corporation actively functioned from about the first of September, through September, October, and a part of November, up to the signing of the Armistice. At the time the corporation was created the United States conveyed to the corporation all of its aeroplane properties and activities and I have that conveyance with me and produce the same.

Thereupon Plaintiff's Exhibit No. 24, being conveyance to the United States Spruce Production Corporation, was introduced in evidence and admitted without objection. Continuing the witness stated:

Prior to the creation of the United States Spruce Production Corporation and the conveyance to it of the properties set forth in Exhibit 24, the activities in aircraft production were carried on by the Production Division, the Bureau of Aircraft Production, and afterwards, the Air Service was charged with the duties of producing aeroplane material from the Forests of the Northwest. The

(Testimony of Max Church.)

Division comprising some 25,000 officers and men proceeded to take the necessary steps to produce this aeroplane lumber. This was accomplished by the building of railroads into proper stands of timber in the Northwest, chiefly in Lincoln [67] County Oregon, and Clallam County, Washington, and the building of Saw Mills, and Cut-up Plants for the manufacture and remanufacture of the forest products, by creating depots at Vancouver Barracks for the getting together of aeroplane material and also for the resawing and remanufacturing of material at that point; Forces of laborers and soldiers of the United States Army were organized for the purpose of maning and operating these activities. The laborers employed were chiefly soldier labor. The officers of the corporation and principal agents were Army officers. The properties described in the complaint in this suit, which is sought to be taxed by Clallam County, Washington was one of the chief projects being prosecuted by the Government prior to the organization of the corporation, and afterwards on the part of the corporation.

The Railroad known as Spruce Railroad No. 1 is Standard gauge constructed of eighty pound steel from a junction point on the Chicago Milwaukee & St. Paul Railroad in Clallam County, generally westward along the north shore of Lake Crescent and to a point near the south shore of Lake Pleasant in Clallam County Washington, and is approximately thirty-six miles in length, besides sidings, turnouts and necessary switching facilities.

(Testimony of Max Church.)

The mill site is of approximately one hundred acres at Port Angeles Washington, on tide water, and a Mill was erected with a Machine shop, burner, and other structures necessary for the [68] carrying on of the sawmill operations. These properties were originally acquired by the Siems-Carey-Kerbaugh Corporation, which at that time was operating under a contract entered into with the United States Government. These were a part of the properties conveyed by the conveyance and assignment introduced in evidence as Plaintiff's Exhibit 24.

The Government built, operated and completed, added to or controlled thirteen railroads. During its operation three were entirely constructed by the Government and the other ten were railroads which the Government acquired and added to or otherwise handled as its own during the emergency. Two sawmills were constructed besides the cut-up plant at Vancouver Barracks.

The properties mentioned in the complaint were the only ones located in Clallam County, Washington.

Since the signing of the Armistice the Government has taken the necessary steps to protect these properties from fires, and the encroachment of the elements, and to protect them and keep them in a saleable condition, and has from time to time carried on extensive negotiations with parties interested, looking to the sale of the properties. The officers of the corporation have received numerous in-

(Testimony of Max Church.)

structions from the Secretary of War, the [69] chief of airplane service and others who have assumed control of the activities of the Trustees and officers of the United States Spruce Production corporation, which instructions are included in the exhibits which have been introduced in evidence here.

On cross-examination, the witness MAX CHURCH, testified as follows:

\$25,000,000.00 of the Debentures authorized by the Board of Directors of the United States Spruce Production Corporation were actually issued, but a total issue of \$90,000,000.00 was authorized, as appears from Exhibit No. 12. The action of the Board of Directors, authorized and contemplated the Allied Governments taking the debentures as well as the United States. The debentures issued were made payable to the Director of Aircraft Production. They were not offered to the public. Referring to Exhibit 21, wherein it provides "The Board of Directors were also authorized to issue debentures in the sum of \$25,000,000.00 and pay the United States Government the above amount, based on the estimated requirements of the Army and Navy, the allies, including April 13th Debentures should be distributed as follows: Army \$7,725,000.00, Navy \$1,220,000.00. Great Britain \$8,545,000.00; France \$3,845,000.00; Italy \$3,665,000.00. This distribution was not made as Mr. Potter did not accept the suggestion of his subordinate, and that plan was never carried out. After the Armistice was signed nothing was done by the corporation

(Testimony of Max Church.)

excepting the furtherance of liquidating of its assets. [70] I recall entering into a contract with the Puget Sound Mills & Timber Company. I do not recall the date but think it was in February of 1921. This contract covered a period of ten years and contemplated transactions affecting the railroad involved in this action, which is a part of the property of the Spruce Production Corporation. It provided for a method whereby the title to this property could be perfected and put in a saleable condition, and provided for the hauling of logs of the Timber Company over the railroad, during a period of ten years. The document handed to me is a certified copy of the contract with the Puget Sound Mills & Timber Company.

Thereupon Defendants' Exhibit "A," being copy of the contract between the United States Spruce Production Corporation and the Puget Sound Mills & Timber Company, was introduced in evidence and admitted without objection. Continuing the witness stated:

There were other contracts for hauling logs over the Spruce Production Railroad for compensation, and I have copies of two contracts executed between the Corporation and C. J. Erickson. One is supplemental to the other.

Thereupon Defendants' Exhibit "B," being contract dated April 21st, 1919, between the Corporation and C. J. Erickson, was introduced in evidence and admitted without objection, also Defendant's Exhibit "C," being supplemental contract between

(Testimony of Max Church.)

the corporation and C. J. Erickson, under date of July 20th, 1920, was introduced in evidence and admitted [71] without objection. Continuing the witness stated:

These were all the contracts relating to hauling products over this road that I recall and I am sure that is all. The corporation also entered into a contract with the Clallam Lumber Company for the purchase of Logs. This was a written contract but I have no copy of it with me. My best impression is that this contract was entered into the latter part of 1920. The dealings with the Clallam Lumber Company involved claims against both the Government and the Spruce Corporation. Part of it was the settlement of these claims. The contention was made by the Clallam Lumber Company that an isolated body of timber, at the western terminus of this Spruce Railroad No. 1, was made valueless to them by reason of the ownership of the railroad, and in the settlement of the various claims on both the part of the Spruce Production Corporation and the Clallam Lumber Company, the price was set on this timber, which included some 6,000,000 feet and it was taken over by the corporation. The Spruce Production Corporation, as a part of the same transaction, secured from the Clallam Lumber Company a release of the claims which had been prosecuted by the company against the corporation. My impression is that the Spruce Production Corporation paid the Clallam Lumber Company three dollars per thousand for that body of timber. The

(Testimony of Max Church.)

Spruce Production Corporation [72] thereafter resold this timber to Mr. Erickson and I think the price was five dollars for all species other than Hemlock and two dollars for hemlock. The Spruce Production Corporation held this timber a matter of a few months before selling it.

In a certain sense there were other transactions involving the purchase of timber and reselling it. There was a transaction entered into by the corporation which was undertaken before the organization of the corporation, as a part of the acquisition of the capital property and afterwards, in the course of liquidation, sold. This was a tract of timber in Lincoln County, Oregon. It was purchased for a figure agreed upon by the Government before the organization and was afterwards sold with a sawmill and railroad but was not priced separately from the other property.

Spruce Production Railroad No. 1 is thirty-six miles long and with a right of way one hundred feet wide, covering the whole distance. All of the right of way was acquired by purchase or by license from the Forestry Department of the Commissioner of Public Lands of the State.

At the time of the organization of the Spruce Production Corporation the work of construction of the railroad was well advanced, but it is impossible for me to say with any exactness, [73] how much was constructed after the organization because the operations *was* carried right on through. In constructing the sawmill it was the intention to make the com-

(Testimony of Max Church.)

plete mill such as would saw the logs and complete the manufacture to a finished product. The mill building was practically completed, the machine-shop was built; and almost completed; the foundation for the burner was in; the log haul was installed; the bulkhead was built along the tide frontage to save the property, and the structures were almost complete. The mill was never actually operated. The plan was to construct a mill for the purpose of aeroplane lumber manufacture, but it was to be a complete sawmill for the purpose for which it was built, viz., to produce aeroplane material, but the plan of its construction would permit the production of material for commercial purposes. If used for general commercial purposes I am informed it would necessitate certain changes in the plans and equipment.

Matters pertaining to accounts or balance sheets *was* prepared by the accountant and I haven't them. I haven't the information in regard to the number of employees or pay-rolls but that information has been furnished and is here. In speaking of the Government and Spruce Production Corporation, it is impossible for me to differentiate, when officers [74] wearing the uniform of the United States Army would come and carry on negotiations and have discussions and when such army officers act I cannot undertake to say that it is not the Government. A great many of these negotiations were carried on by officers of the United States Army. All the contracts were contracts of the Spruce Pro-

(Testimony of Max Church.)

duction Corporation, but I want to be understood to say that the negotiations looking to the salvaging of these properties was by the Government. A great many of the negotiations were made by these officers for the United States Government and the United States Army. They were negotiations had with prospective purchasers but I do not know that any of them negotiated independently of the Spruce Production Corporation or the officers of the Spruce Production Corporation.

On redirect examination the witness MAX CHURCH testified as follows:

Each of the Trustees who held office made an assignment by which they surrendered all rights or claims to any personal or private interest in the shares of stock they owned or held. The assignments were all alike and are in the form of the assignment signed by Major Fickel, shown on page 289 of the record book and is as follows: "For value received, I hereby assign, and set over to the Secretary of War of the United States of America, or to his order, for the benefit of the [75] United States of America, any and all moneys, property or dividends, which are now due me, or which may hereafter become due me or accrue to me from any source whatsoever, by reason of any stock in the United States Spruce Production Corporation, a Washington corporation. It is understood that the share of stock now standing in my name on the books of the corporation has been issued to me solely

(Testimony of Max Church.)

for the purpose of qualifying me as a Trustee of said corporation.”

The Certificates of Stock of this corporation are in the Stock Book in my custody. All the Trustees of the corporation have endorsed their share in blank and turned them back to the Secretary. Certificate No. 8 was issued to the Director of Aircraft Production of the United States for 99,993 shares of stock. At the time this certificate was issued the number of trustees as provided by the Articles of Incorporation was seven, thereafter, the number of trustees was reduced, by amendment of the Articles of Incorporation to three. Whereupon four shares which were held by the outgoing trustees were issued on certificate numbered seventeen to the Director of Aircraft Production of the United States. The Certificates are in the hands of the Director of Aircraft Production, lodged for safe-keeping with the chief of Finance of the United States. The physical custody of the shares of stock held by the respective Trustees, is in the Secretary of the United States Spruce Production Corporation. [76]

At the time the Armistice was signed some of the titles to the railroad right of way had been acquired by the Siems Carey H. S. Kerbaugh Corporation, but a portion of the titles had not been acquired at that time and was subsequently acquired by the corporation itself, and a considerable amount of this right of way acquired by the corporation itself was acquired from the Puget Sound Mills &

(Testimony of Max Church.)

Timber Company. The contract which had been referred to as having been entered into with the Puget Sound Mills & Timber Company, covered that transaction. The land belonging to the Puget Sound Mills & Timber Company, which was acquired pursuant to the terms of the contract in evidence, was necessary as an integral part of the Spruce Production Railroad No. 1, a considerable portion of it.

The contract with the Clallam Lumber Company *was* has been referred to was not a matter involving a continuity or right of way. There was a little difference between the Clallam Deal and the Puget Sound deal. The corporation has a number of dealings on different transactions with the Clallam Lumber Company relating to the acquisition of right of way for the railroad. The final settlement with the Clallam Lumber Company was a transaction whereby we got a complete clearance for the western termination of the railroad, which was a part of the lands acquired by the corporation under its activities, the title to which was not perfected until this contract was entered into. So that there will be no misunderstanding I want to [77] explain that part of the land involved was used by the corporation, and its predecessors the Siems Carey H. S. Kerbaugh Corporation, for a mill site down there. In the actual settlement of the claim for damages to other lands, some of this land was turned back to the Clallam Lumber Company and its acquisition of this timber was a condition precedent to a

(Testimony of Max Church.)

general release by the Clallam Lumber Company to the United States Spruce Production Corporation.

On Armistice Day the railroad was not completed. There was some other necessary work to be done to hold the property together and preserve it. I am not prepared to say the amount of or the nature of such work but its character was the completion of the railroad by laying steel and putting ties in place and putting in switches and other things incident to the finishing of the railroad in the course of construction. There was some timber down on the right of way and two contracts were entered into with C. J. Erickson with respect to cleaning up down timber. A contract and a supplemental contract, these being the contracts introduced in evidence as Defendants' Exhibits "B" and "C."

None of the debentures authorized was taken by the Allied Government or any Government other than our own. We had some dealings with the Allies direct. That is to say the United States Government had dealings with them both before the organization of the corporation and afterwards which were charges against the allies, for deliveries of aeroplane material and credits and [78] and payments on these charges for deliveries. I am not prepared to say whether these payments were made to the Treasurer of the United States or to the Corporation. Mr. O'Kelly knows. There was \$25,000,-000 of these debentures authorized and they were all purchased by the Government of the United

(Testimony of Max Church.)

States. At the time of the actual transfer by the Secretary of War to the corporation as shown by the instrument of conveyance that has been introduced in evidence, there was a certain amount of money which had been expended by the Spruce Production Division and the Bureau of Aircraft Production, which at that time it was impossible to determine the exact amount of, and it was estimated the sum of Ten Million Dollars to be ample to cover the expenses up to the time of this taking over. Twenty-five Million Dollars worth were issued and Fifteen Million cash issued to the corporation and the balance of ten million was used as a setoff against a valuation of the property which came into the corporation through this assignment. The corporation has never declared any dividends.

(Witness excused.)

Testimony of W. H. O'Kelly, for Plaintiffs.

W. H. O'KELLY, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

My name is W. H. O'Kelly. I reside at Portland, Oregon, and I am an accountant and since March [79] 1920 I have been the accountant for the United States Spruce Production Corporation. It is my duty to keep the books and records and have charge and custody of the books of account and vouchers for payments and disbursements. I know the method of keeping the accounts as between the corporation and the Government. In the liquidation of the affairs of the corporation whenever

(Testimony of W. H. O'Kelly.)

enough funds are accumulated the money is forwarded to the Chief of Finance to retire some of the Debenture Bonds. There is an account between the Government and the Corporation. I have an account as between the Government and the corporation which I now produce. Attached to this statement is a letter dated November 11th from the Chief of Air service to the Comptroller of the corporation in relation to the attached account.

Thereupon Plaintiff's Exhibit 26, being a statement of account between the corporation and the Government, was introduced in evidence and admitted without objection. Continuing the witness stated:

I have prepared a statement of the railroads built during the activities, and the cost of the same, which I now produce.

Thereupon Plaintiff's Exhibit No. 27, being a statement of the railroads built and their cost, was introduced in evidence, and admitted without objection. Continuing the witness stated:

I have prepared a statement of the amount of war material that was produced during these activities [80] which I now produce.

Thereupon Plaintiff's Exhibit No. 28, being a statement of war material produced, was introduced in evidence and admitted without objection. Continuing the witness stated:

I have prepared a statement of the cash receipts and disbursements of the corporation, which is cor-

(Testimony of W. H. O'Kelly.)

rect according to my books, and which I now produce.

Thereupon Plaintiff's Exhibit No. 29, being a statement of the receipts and disbursements of the corporation, was introduced in evidence and admitted without objection. Continuing the witness stated:

I have made up a statement of the capital expenditures of the corporation by years, according to my books, which I now produce.

Thereupon Plaintiff's Exhibit No. 30, being a statement of the capital expenditures by years, was introduced in evidence and admitted without objection. Continuing the witness stated:

The statement last furnished covered labor, material and supplies. I have a detail of the disbursements up to August 31st, 1918, and I have a total of the disbursements from August 31st, 1918, to March 31st, 1922, which I now produce.

Thereupon Plaintiff's Exhibit No. 31, being a statement of the total of the disbursements, was introduced in evidence and admitted without objection. Continuing the witness stated:

I have made up a labor pay-roll as shown on our books for the month of May, 1922, and the [81] number of employees for that month, which I now produce.

Thereupon Plaintiff's Exhibit No. 32, being a statement of the labor pay-roll for May, 1922, was introduced in evidence and admitted without objection. Continuing the witness stated:

(Testimony of W. H. O'Kelly.)

The corporation is liquidating as fast as they can and selling its assets. Referring to Exhibit No. 30, I will state that my accounts do not show the progress of liquidation since the Armistice Day but taking it by years, taking it from a Trial Balance of August 31st, 1918, and the trial balance of August 31st, 1919, it shows that there was expended by the United States Government and by the United States Spruce Production Corporation the sum of \$17,462,-832.62. The amounts expended by the United States Government and the United States Spruce Production Corporation respectively is not segregated. I get the Government's figures from a trial balance entered on that date, by running across these figures you can get what the Spruce Production Corporation spent. In the final wind-up the Government got debentures for everything that they furnished to the Spruce Production Corporation and also the money the Government had expended prior to that was taken into consideration. The Government subscribed for \$21,500,000 worth of debentures and these were issued to the Government. The entry on our books was that we owed the Government twenty-five million dollars which they [82] had set up against our account and in our account as against the Government we charged them with \$3,500,000 as an offsetting entry to show the balance. All the debentures had been retired except approximately Five Million Three Hundred Thirty-eight Thousand. In the liquidation process the corporation has turned over to the Treasurer

(Testimony of W. H. O'Kelly.)

Ten Million Dollars and they owe us Three Million Five Hundred Thousand Dollars, that has been applied on the debentures. Something over Nineteen Million has been paid back to the Government on these advances.

On cross-examination, the witness W. H. O'KELLY, testified as follows:

The nineteen million paid back to the Government was on advances and these payments were applied on the debentures. The Spruce Corporation got out detailed monthly balance sheets for each month. I have none of them with me.

On redirect examination the witness W. H. O'KELLY, testified as follows:

The operation of the corporation as a whole shows a loss and the total liquidation of all the remaining assets will not be equivalent to the total amount expended in this operation. None of the balance sheets at any time show any profit to the corporation and there never has been a profit.

On recross-examination the witness, W. H. O'KELLY, testified as follows: [83]

One Hundred Thousand has been paid on the stock subscriptions and there is Nine Million Nine Hundred Thousand still unpaid on the stock subscriptions which have not been called. The unpaid outstanding debentures at this time amount to \$5,338,667.09. There was Twenty-one Million Five Hundred Thousand of cash advances through the Spruce Corporation. They charged us with Twenty-

(Testimony of W. H. O'Kelly.)

five Million and we took a credit of Three Million Five Hundred Thousand on our books. The book value of the present assets of the Spruce Production Corporation is \$11,953,904.57. According to the books of the corporation if the Nine Million Nine Hundred Thousand of unpaid stock subscriptions were paid in, it would appear that the corporation would pay out all its liabilities and have money over.

The liabilities of the corporation, outside of the Five Million Three Hundred Thousand Debentures are the liabilities of the capital stock One Hundred Thousand and current liabilities of \$28,482.49. The current liabilities are some invoices unpaid and reserves that were set up to take care of our losses that will be anticipated in selling the properties. The property is set up at cost. The present unpaid liabilities are \$28,000.00 current liabilities One Hundred Thousand paid in on capital stock and Five Million Three Hundred Thousand of debentures and as against that we have book assets of something over eleven million dollars at cost. That is the way we carry them on our books. [84]

On redirect examination the witness, W. H. O'KELLY testified as follows:

The assets of Eleven Million is represented by the cost, of what the railroad, the principal asset at the present time, cost. That is not the same as present cost or what we can get for them but is about five times what we expect for them.

(Witness excused.)

Testimony of Charles Van Way, for Plaintiff.

CHARLES VAN WAY, being called as a witness on behalf of the plaintiffs, after being first duly sworn, testified as follows:

My name is Charles Van Way. I am Lieutenant-colonel of Cavalry in the United States Army and reside at Vancouver Barracks Washington. I am the president of the United States Spruce Production Corporation and have been such throughout the past two and one-half years. I was assigned to that duty with this corporation by the War Department and elected as president by the Board of Trustees of the corporation.

Counsel for plaintiffs then stated:

I want the record to show that these military officers have been assigned to different duties by the War Department and that they draw their salaries from the Treasury of the United States and not for the Spruce Production Corporation.

Counsel for defendants objects. [85]

The COURT.—I think the objection will be sustained to the question as propounded, but you may ask him where he gets his compensation.

COUNSEL FOR PLAINTIFFS.—It is one of the important points to us whether this is a private corporation as distinguished from a Government corporation. It is my position and my purpose to show by this witness that he and the other officers of the corporation are officers of the United States Army acting under express orders of the War De-

partment having been assigned to this duty the same as an officer assigned to regular duties in the course of army work and it is to connect this corporation and its activities with the War Department and to show it is not an independent corporation but is a part of the War department activities.

The COURT.—Your purpose was apparent a long time ago but let him just state the facts. We all know that he is an officer and was assigned to duty and the minutes show that he was elected to the board and he can show who pays him and whether he gets a compensation from the corporation or whether he gets his compensation from the Government.

Counsel for defendants then objects to the testimony on the general ground that it is immaterial.

The COURT.—The answer may give what compensation he gets and where it comes from but the objection will be sustained to the extent I have stated. [86]

COUNSEL FOR PLAINTIFFS.—I want to show that he has an assignment as any military officer has to his duty, by a direct order. I want to show that he was delegated to take charge of this work by the War Department.

The COURT.—This being a court case, he may state, in addition to what I have stated a while ago, what, if any, additional duties were imposed upon him by his superior officers in assigning him to Vancouver.

Thereupon counsel for defendants requested that it be understood that all evidence touching upon these points go in subject to objection.

The COURT.—It will be so understood. Continuing the witness stated:

I am not paid any salary by the corporation but receive my compensation from the pay of the army through the finance officer of the district in which I serve. I receive the exact pay of an officer of my rank and it comes from the United States Treasury and not from the assets of this corporation. I was directed to this duty by an order of the War Department issued in the regular way, specifying that I be the President of this corporation. The other officers of the corporation are assigned under similar orders from the War Department to other duties. Other officers assigned to the corporation are paid from the same source. I get orders from time to time from the War Department with reference to the management of the corporation and I am summoned to Washington occasionally to receive orders. [87] I report to the department as to matters of business handled by the corporation, regularly, and auditors and inspectors from the War Department are detailed to check and examine the books and accounts. No important contracts or transactions are carried on by the officers or trustees without the direct and expressed rule and direction of the War Department. The Director of Aircraft production is the superior officer in the War Department with charge of these activities and he

(Testimony of Charles Van Way.)

is directed by the Secretary of War. I frequently get directions from and have conference with the Secretary of War about these activities. In the matter of the liquidation of the corporation, the trustees have gone to Washington to submit these matters to the Secretary of War himself. The officers and trustees do not take any action independent of these instructions from Washington.

On cross-examination the witness VAN WAY testified as follows:

The United States Government, as holders of the majority of the stock of the corporation might control the board but I never looked on it that way. The corporation has civilian employees and they are paid out of the Spruce Production funds. Mr. Church the Secretary of the corporation is a civilian and was elected by the Board of Trustees of the United States Spruce Production Corporation. Mr. [88] O'Kelly is also a civilian. I do not know how many civilian employees there were during the latter part of 1918. At the time of the Armistice there were approximately thirty thousand troops consisting of twenty thousand enlisted men and eleven thousand officers but I am unable to state how many civilians. Since I have been assigned to this corporation substantially my sole duty has been confined to operating this corporation for the last two and a half years. When this corporation was organized four out of the seven trustees, viz: Messrs. Ladd, Benson, Reed and Donovan were civilians. The present Trustees are Colonel

(Testimony of Charles Van Way.)

Fuller, Charles H. Carey and myself being two army men and one civilian. The Secretary and Accountant are civilians and all other employees are civilians there being only two officers with the corporation.

Testimony of Arthur L. Fuller, for Plaintiff.

ARTHUR L. FULLER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

My name is Arthur L. Fuller. I reside at Portland Oregon and I am a member of the Board of Trustees of the United States Spruce Production Corporation and its comptroller and Treasurer and have charge of the accounts and books of the corporation. I am a Lieutenant-colonel in the United States Army and was assigned to this duty by the Secretary of War. [89]

Thereupon counsel for plaintiff propounded the following question to the witness.

Q. About what time did you begin your service?

Thereupon counsel for the defendant objected on the ground that the same was immaterial.

The COURT.—The objection will be noted and I will let it go into the record so the counsel can present his views on the law in the matter later. Continuing the witness stated:

I began my services about a week ago. I had a certain general knowledge of the affairs of the United States Spruce Production Corporation by reason of the fact that I was budget officer of the

(Testimony of Arthur L. Fuller.)

Air Service of the War Department for some time prior to coming out here on this duty. I succeeded Major Fickle as a member of the Board of Directors and Treasurer of the corporation. Up to a week ago he was serving in that capacity. The administration of the budget law for the Federal Government calls for a budget officer for each Executive department and each major branch of every department, and as budget officer for the air service, I became familiar with the history of this corporation and its affairs. In the financial affairs of the air service in its ordinary administration no distinction is drawn between the Spruce Production Corporation and any other part of the air service. I have here the army regulations that cover this matter of the Spruce Production corporation which I now produce. [90]

Thereupon counsel for plaintiff requested the witness to read into the record any regulations bearing on the matter.

Thereupon counsel for defendants objected on the ground that the same was incompetent, immaterial and irrelevant, and simply encumbering the record.

The COURT.—The objection is sustained; you are asking him to read what he thinks has a bearing on it.

Thereupon counsel for plaintiff offered in evidence Army Regulations No. 95-5 date November 17th, 1921, paragraph "E."

(Testimony of Arthur L. Fuller.)

Thereupon counsel for defendants objected to the offer on the ground that it was incompetent, immaterial and irrelevant and tends to prove no issue in this case.

The COURT.—Just read it into the record.

The witness reads: "I, the chief of Air Service—(inserting the words) 'chief of Air Service'—will, in accordance with instructions from the Secretary of War, exercise administrative supervision over the liquidation of the Bureau of Aircraft Production and the United States Spruce Production Corporation." This regulation was issued November 21st and is a substitution for the former provision in Army Regulations which is a continuous series and are the same regulations which continued in the past prior to the date of this particular list of regulations under instructions of the Secretary of War. As Budget Officer of the Air Service I made inquiries as to the situation in general of the United States Spruce Production Corporation and by this means became familiar with the method of handling the finance [91] affairs of the corporation and its regulations with the War Department but I did not have charge of any detailed records. The function of the budget officer in relation to the Spruce Production Corporation would require him to be informed as to the financial regulations of the Spruce Production Corporation to the air service in order that if further appropriations from Congress were required for any purpose the necessary action could be taken. He must know in

(Testimony of Arthur L. Fuller.)

general the debit and credit situation with reference to the Spruce Production Corporation.

Thereupon counsel for plaintiffs propounded the following question to the witness:

Q. Will you outline briefly the various steps taken by the United States in getting out the aeroplane material before the war and include a history up to date?

Thereupon counsel for defendants objected on the ground that it was immaterial, incompetent and irrelevant and tended to prove no issue in the case.

The COURT.—I do not see how that could in any way affect the legal situation here that we are inquiring about, the steps taken.

Thereupon counsel for plaintiff stated: Maybe it is rather vague and remote but I will explain what I am getting at, for counsel's benefit as well as the Court. This corporation was the result of a certain evolutionary process as shown by the evidence already shown here. The original suggestion and its development in the incorporation [92] of this corporation and its activities all fit in with certain other war transactions. It had not only the duty of getting out war material for the army itself during the war but under the act of Congress, for the navy, but prior to its activities a certain amount of aeroplane material had been gotten out and perhaps very extensively, running into millions of dollars which was transferred to the corporation. The history of the various acts

(Testimony of Arthur L. Fuller.)

of Congress and the orders of the department which worked out this corporation scheme and made it a part closely correlated with what had been done and what would be done is necessary to be shown in some way in the case, either by argument from the various statutes or by the statement of some witness who is familiar with it. My purpose is briefly to give a survey of that in a few sentences that might take a long time in other ways.

The COURT.—How long will it take to tell it.

The WITNESS.—Five minutes.

The COURT.—All right, tell it.

Continuing the witness stated: Aeronotic matters of the department, in the beginning of the war, were handled by the signal corps of the army. In May, 1918, the President, by virtue of the Power conferred upon him by the so-called Overman Act, redistributed the powers and functions of the Executive department, created the Bureau of Aircraft Production [93] and a division of Military Aeronotics, the Bureau with which we are concerned here, the executive officer of which was the Director of Aircraft Production. The officer referred to in the Act authorizing the organization of the Spruce Production Corporation, who under instructions contained in that proclamation functioned under the Secretary of War. On January 29th, 1919, susequent to the Armistice these two divisions were placed together, forming the Air Service as then provided for by Army regulations, functioning under the Director of Air Service,

(Testimony of Arthur L. Fuller.)

whose title was subsequently changed to Chief of Air Service, July 11th, 1919, by act of Congress approved that date, this Organization of Air Service with its powers, functions, and duties then provided by orders and Army Regulations continued until June 30th, 1920, on which date the National Defense Act, amended came into effect and is in effect now, and provided for the office of chief of Air Service, that officer who controls and directs the aircraft production under the Army Regulations. There has been certain settlements made between the Spruce Production Corporation and the War Department.

(Witness excused.)

Testimony of W. J. Barry, for Plaintiff.

W. J. BARRY, produced as a witness for plaintiff, being first duly sworn, testified as follows:

My name is W. J. Barry, and I live in Washington D. C. I am Senior Cost Accountant, Air Service, War Department, United States Army. In April, 1922, I was given orders through the Chief of Air Service to proceed to [94] Portland, Oregon, and make a report of the United States Spruce Production Corporation. I arrived here on May 2d and am still making it. This is the regular audit and is continued from the previous audit which was from September, 1920. I am making an audit up to date. I get my pay from the Finance Officer of the United States Army at Washington, D. C. There has been no final account

(Testimony of W. J. Barry.)

between the Government and the corporation or any financial adjustment arrived at and cannot be until the final liquidation. There are no accounts between the corporation and any of the Allied Governments. The Allied Governments are dealt with through the Government direct in the general settlement.

On cross-examination the witness W. J. BARRY testified as follows:

The books of the corporation do not show sales of aeroplane materials to the allies and there are no entries on the books of that kind and never was. There are no receipts from that source and no credits on accounts whatever. The only account was with the United States Government. There is no account in regard to the Debentures with any allied government. There are accounts with hundreds of citizens of the State of Washington and Oregon.

(Witness excused.) [95]

Thereupon counsel for the plaintiffs stated that the defendants had requested a certain balance sheet which we have sent for to the office of the corporation and it is our understanding it may be introduced to-morrow morning. It will arrive by that time and with that exception our case is closed so far as the plaintiff is concerned.

Thereupon counsel for the defendants stated: We have no evidence outside of that balance sheet we have asked for. All the evidence has gone in at this time and the case can now be considered

closed with the introduction of that one balance sheet. The contract with the Callam Lumber Company will be waived.

Thereupon the evidence was closed.

Thereupon counsel for the defendants moved the Court to dismiss the action upon the grounds:

1. That the Court has no jurisdiction.
2. That the United States is neither a necessary nor proper party.
3. That this cause of action does not arise under any law or the constitution of the United States and the suit is between citizens of the same State.

Thereupon counsel for the defendants, without waiving the foregoing motion further moved that the case be dismissed on the ground that the complaint does not state facts sufficient to constitute a cause of action and does not show facts entitling the complainant to the relief sought or any relief whatever, and on the further ground that the evidence introduced fails to show any cause of action and fails to show that the plaintiffs are entitled to the relief sought or to any relief whatever. [96]

Thereupon argument for counsel for the respective parties was had and on June 16th, 1921, the cause was submitted to the Court and was by the Court taken under advisement.

[Endorsed]: Statement of Evidence lodged Sept. 22, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

Statement of Evidence approved and order approving filed in the United States District Court,

Western District of Washington, Northern Division, Oct. 9, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [97]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 294—E.

UNITED STATES OF AMERICA and UNITED
STATES SPRUCE PRODUCTION COR-
PORATION, a Corporation,

Plaintiffs,

vs.

CLALLAM COUNTY, Washington, WILLIAM A.
NELSON, Sheriff of Clallam County, Wash-
ington, E. S. STEWART, Treasurer of Clal-
lam County, Washington, and J. O. MORSE,
Assessor of Clallam County, Washington.

Defendants.

Praeipie for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the record in the above-entitled cause for use on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to be transmitted to the Clerk of said Circuit Court of Appeals, and you will please incorporate into such transcript the following portions of the record in this cause:

1. The bill of complaint.
2. The defendants' answer.

3. The decision of the Court.
4. Decree.
5. Assignments of error.
6. Petition for Appeal.
7. Order allowing appeal.
8. Appeal bond.
9. Stipulation that original exhibits be forwarded to the Circuit Court and that same be not printed.
10. Statement of the evidence. [98]
11. Notice by defendants to plaintiffs that defendants would ask the Court to approve the statement of the evidence on October ninth, 1922.
12. Praecipe.

The original citation, with plaintiff's acceptance of service thereof, should accompany the transcript.

WM. B. RITCHIE,

County Attorney.

ELLIS, FLETCHER & EVANS and

T. F. TRUMBULL,

Attorneys for Defendants.

The service of the above praecipe and the receipt of a true copy thereof is acknowledged this 10th day of October, 1922.

CAREY & KERR,

THOMAS P. REVELLE,

JOHN A. FRATER,

Attorneys for Plaintiffs.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Oct. 11, 1922. F. M. Harshberger, Clerk,
By S. E. Leitch, Deputy. [99]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 294—E.

UNITED STATES OF AMERICA and UNITED
STATES SPRUCE PRODUCTION COR-
PORATION, a Corporation,

Plaintiffs,

vs.

CLALLAM COUNTY, WASHINGTON, WILL-
IAM A. NELSON, Sheriff of Clallam
County, Washington, E. S. STEWART,
Treasurer of Clallam County, Washington,
and J. O. MORSE, Assessor of Clallam
County, Washington,

Defendants.

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States
District Court for the Western District of Washing-
ton, do hereby certify and return that the foregoing
pages, numbered from one to 99 inclusive, con-
stitute a full, true, correct and complete copy of so
much of the record, papers, and other proceedings

in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant [100] for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.), for making record, certificate of return, 262 folios at 15¢.....	\$39.30
Certificate of Clerk to transcript of record, 4 folios at 15¢ .....	.60
Seal to said certificate .....	.20
Certificate of Clerk to original exhibits, 4 folios at 15¢.....	.60
Seal to said certificate.....	.20

I hereby certify that the above cost for preparing and certifying record on appeal, amounting to \$40.90 has been paid to me by solicitors for appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 25th day of October, 1922.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western Dis-
trict of Washington. [101]

In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.

No. 294—E.

UNITED STATES OF AMERICA and UNITED
STATES SPRUCE PRODUCTION COR-
PORATION, a Corporation,

Appellees,

vs.

CLALLAM COUNTY, WASHINGTON, WILL-
IAM A. NELSON, Sheriff of Clallam
County, Washington, E. S. STEWART,
Treasurer of Clallam County, Washington,
and J. O. MORSE, Assessor of Clallam
County, Washington,

Appellants.

Citation.

The United States of America: To the United
States of America, and United States Spruce
Production Corporation, a Corporation,
GREETING:

You, and each of you, are hereby notified that in
a certain suit in the United States District Court

for the Western District of Washington, Northern Division, wherein United States of America and the United States Spruce Production Corporation are plaintiffs, and Clallam County, Washington, William A. Nelson, Sheriff of Clallam County, Washington, E. S. Stewart, Treasurer of Clallam County, Washington, and J. O. Morse, Assessor of Clallam County, Washington, are defendants. An appeal has been allowed the defendants herein to the United States Circuit Court of Appeals, for the Ninth Circuit.

You are hereby cited and admonished to be and appear in said United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, thirty days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done to the parties in that behalf. [102]

WITNESS the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 11th day of October, 1922.

JEREMIAH NETERER,

Judge of the United States District Court for the Western District of Washington, Northern Division.

Received a copy of the above and foregoing citation this 11th day of October, 1922.

CAREY & KERR,

THOS. P. REVELLE,

JOHN A. FRATER,

Attorneys for Plaintiff. [103]

Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 11, 1922. F. M. Harshberger, Clerk. By L. E. Leitch, Deputy.

[Endorsed]: No. 3938. United States Circuit Court of Appeals for the Ninth Circuit. Clallam County, Washington, William A. Nelson, Sheriff of Clallam County, Washington, E. S. Stewart, Treasurer of Clallam County, Washington, and J. O. Morse, Assessor of Clallam County, Washington, Appellants, vs. The United States of America and United States Spruce Production Corporation, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 27, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CLALLAM COUNTY, WASHINGTON,
WILLIAM A. NELSON, Sheriff of
Clallam County, Washington,
E. C. STEWART, Treasurer of
Clallam County, Washington,
and J. O. MORSE, Assessor of
Clallam County, Washington,
Appellants,

7
No. 3938

VS.

THE UNITED STATES OF AMERICA,
and UNITED STATES SPRUCE PRO-
DUCTION CORPORATION, a corpora-
tion,
Appellees.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION

APPELLANTS' BRIEF

ELLIS FLETCHER & EVANS,
WILLIAM B. RITCHIE,
THOMAS F. TRUMBULL,
F. L. PLUMMER,
JOHN M. WILSON,
Attorneys for Appellants.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CLALLAM COUNTY, WASHINGTON,
WILLIAM A. NELSON, Sheriff of
Clallam County, Washington,
E. C. STEWART, Treasurer of
Clallam County, Washington,
and J. O. MORSE, Assessor of
Clallam County, Washington,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
and UNITED STATES SPRUCE PRO-
DUCTION CORPORATION, a corpora-
tion,
Appellees.

No. 3938

STATEMENT

The appellees, on the 6th day of April, 1922, filed in the above District Court their complaint against the appellants.

The complaint seeks the cancellation and a permanent injunction against the collection of certain state and county taxes levied by appellants, Clallam County and the County's taxing officers, upon certain lands and properties, title to and possession of which is and has been during the years for which such taxes have been levied, in the appellee, United States Spruce Production Corporation, and located in Clallam County, State of Washington.

The United States has been joined as a party plaintiff with the Spruce Corporation and the defendants are Clallam County and its taxing officers.

The complaint for cause of action alleges in substance as follows:

That the suit arises under the laws of the United States; that the United States Spruce Production Corporation, hereinafter called the Spruce Corporation, is a corporation organized and existing under the laws of the State of Washington, and a citizen of the said state; that it has been licensed and authorized to do business in said state and has in all respects complied with all the laws of said state entitling it to transact business in said state.

That it was so incorporated pursuant to certain war acts of Congress, especially the act of July 9, 1918, amending the act of April 11, 1918.

That the appellant, Clallam County is a municipal corporation of the State of Washington, and the other appellants, defendants in said action, are officers of said county.

That more than three thousand dollars is involved.

That certain war legislation and especially acts of Congress of June 3, 1916, March 4, 1917, July 24, 1917, authorized the President to acquire spruce and fir lumber and other commodities as war materials, and to manufacture the same for the use of the army

and navy. That these powers were exercised, and the War Department and the Chief Signal Officer made plans to produce such material and to build railroads, air craft machines, and factories therefor, and to do all things necessary thereto under an appropriation of Congress of six hundred forty million dollars.

That under the act of March 4, 1917, such powers could be exercised through any agency that the President might adopt.

That under the act of April 11, 1918, as amended by the act of July 9, 1918, the Secretary of War could condemn lands timber, saw mills, equipment, etc., for such purposes and could purchase or contract for use of the same.

That under said powers and for war purposes the construction of a logging railroad in Clallam County known as Spruce Production Railroad No. 1 was commenced and the properties in controversy in this suit were acquired.

That such construction and acquisition was first commenced and practically completed under a contract between the United States and the Siems-Carey-H. S. Kerbaugh Corporation.

That thereafter this contract and the railroad, mill and mill site, and other properties acquired by the United States under the contract, were transferred and conveyed by the United States to the ap-

pellee, Spruce Corporation, which corporation thereafter continued such construction of the railroad and mill and the acquisition of property.

That the United States selected the railroad route and the same was constructed, right-of-ways and other properties acquired for and belonged to the United States, although the title was transferred to the Spruce Corporation and is carried in its name for convenience.

A lengthy description of the railroad, mill site and the properties in question is set forth in the complaint.

That under the act of July 9, 1918, the Director of Air Craft Production was authorized in carrying it out to form corporations under the laws of the several states of the United States, and to exercise the powers conferred through the agency of such state corporations, the United States to own all or not less than a majority of the capital stock of such corporation.

The act gave authority to transfer and convey to such corporation any contracts held by the United States for air craft production and the title to lands and property acquired for such purpose.

In carrying out such authority the Director of Air Craft Production caused the appellee, Spruce Corporation, to be formed as a corporation under the laws of the State of Washington, the United States

owning and controlling all its capital stock; that such corporation is merely an arm, agency or instrumentality of the United States Government to carry out the purposes of said acts of Congress. That no one other than the United States has any ownership of or interest in the properties in controversy held by the Spruce Corporation or the stock of said corporation.

That the Board of Directors of the Spruce Corporation are named by the United States.

That the Siems-Carey-Kerbaugh contract, the railroad and all properties in controversy, were transferred and conveyed by the United States to the Spruce Corporation and title was acquired and possession held by such Spruce Corporation prior to 1919 and prior to the levy of the taxes sought to be avoided.

That the taxing officers of Clallam County did not list said properties for state and county taxes in the years 1919 and 1920, but in making up the tax roll for state and county taxes for the year 1921 said properties were assessed for taxes for the three years.

Statement of the assessed valuations for each of the three years in question of the different descriptions with the amount of the tax assessed for each year is set forth in the complaint. This shows an assessed valuation of over half a million. (Under the laws of the State of Washington the assessed

valuation is 50 per cent of the full value.) Taxes for the three years aggregated \$80,525.79.

That the appellants threaten and will unless enjoined, enforce collection of said taxes.

That the property is not subject to state taxation for the reason that the property in fact belongs to the United States; that it is held by the Spruce Corporation merely as an agency of the United States for the purposes set forth in the complaint.

There is no claim of any invalidity or irregularity in the tax or want of power or misconduct of the taxing officers other than that the property is exempt as belonging to the United States.

The complaint further alleges that such tax is a cloud on the plaintiffs' title; that by reason of the assessment the appellants are claiming a lien and interest in the property adverse to the appellees and that this suit is to determine such interest, claim or lien. That the United States has expended through the agency of the Spruce Corporation more than a million dollars in building and acquiring the properties in question all of which it is claimed is held for government purposes and all is essential to a government enterprise.

That the threatened collection of said taxes would produce irreparable injury to the appellees and there is no available, speedy or adequate remedy at law.

The prayer is for a decree adjudging the taxes void, the property exempt and removal of the tax cloud, quieting title in appellees against the taxes and for a permanent injunction enjoining appellants from taxing the property or attempting to collect the tax, and for costs and general relief. (Record p. 2 and following.)

Appellants filed their answer to this complaint on the 21st day of April, 1922, and by their answer admitted the Acts of Congress and the purpose and construction of the same as alleged and claimed in the complaint, but by denials and affirmative defenses raised the following issues.

(1) That the United States District Court was without jurisdiction for the reason that the cause of action did not arise under the laws of the United States as no Federal question, constitutional question or construction of any law of the United States was involved; that the United States was neither a necessary or proper party plaintiff and the suit was one solely between citizens of the State of Washington.

(2) That the complaint did not state facts sufficient to constitute a cause of action in equity.

(3) That the property was located in Clallam County, State of Washington, and was owned and possessed by a citizen of the State of Washington, to-wit, the Spruce Corporation (the United States being a stockholder) and was subject to state, and county taxes as other property.

That the fact, if it were a fact, that the Spruce Corporation was an agency of the United States, could at most only prohibit the state and county from taxing its right to exist and carry on business, but not from taxing the physical properties belonging to such agency as other properties in the state were taxed.

(Record, p. 32 and following.)

TRIAL

At the opening of the trial and before any evidence was taken, defendants interposed objection to the jurisdiction of the court, and moved for a dismissal of the action on the following grounds:

(1) That the United States of America is neither a necessary nor a proper party to the suit.

(2) That the cause of action does not arise under the constitution or any law of the United States.

(3) That there is no disputed construction of the laws of the United States.

The court reserved its ruling on the motion and objections pending the taking of testimony.

(Record, p. 65-66.)

The following are substantially the facts in the case:

By reason of the world war, Congress of the United States as war measures enacted the various

statutes referred to in the complaint, giving powers and authority to the President of the United States, Secretary of War and the United States Officers in charge of preparations for and prosecution of the war as set forth in the complaint, empowering them to acquire and manufacture air crafts and do all things necessary to that end.

That in carrying out such powers the United States desired to acquire a large body of spruce timber in Clallam County, Washington, and to build and locate a railroad a distance of some thirty-six miles into the same and construct a mill to manufacture the same into air craft and to do whatever was necessary to that end.

The United States for this purpose entered into a contract with the Siems-Carey-H. S. Kerbaugh Corporation in order to acquire these properties and construct such railroad and continued to prosecute the same. On September 1, 1918, the United States had an investment in the same of \$274,164.76 and outstanding obligations of \$2,325,835.00 and three million of accrued charges for amortization already realized by the United States by including in the price of lumber sold and consumed (Ex. 22).

Congress had passed the act of July 9, 1918, which act authorized the Director of Air Craft Production when in his judgment air craft production would be so expedited, *to form corporations under the laws of the several states of the Union*, for the purpose of acquiring and manufacturing air craft

and the building of railroads in connection therewith. The capital stock and bonds and debentures of such corporation not to exceed one hundred million.

The United States might be a subscriber to the capital stock or purchaser of the same, or of such corporations' bonds and debentures, but at no time to hold less than a majority of the stock. The United States could sell such stock and bonds so subscribed for or purchased, but at no time to be a minority in stock voting power. That any appropriation for the purchase of air craft could be used for the purchase of such capital stock or bonds of such corporation; that enlisted men could be assigned to work for such corporations, but the corporation could employ "civilians in the manner customary in the conduct of ordinary business under corporate organizations." Authority is given by the act to transfer to such corporation "any interest of the United States in any existing contracts for air crafts * * * and the title to any lands, plants, railroads, or equipment or material therefor," on such terms as the Secretary of War may deem fit. That within one year after the treaty of peace "the Director of Air Craft Production shall, on behalf of the United States *as a stockholder*" institute proceedings to dissolve the corporation under state laws. On dissolution the assets are to be distributed *in accordance with the laws of the state under which the corporation was organized*.

There is no exemption or suggestion of exemption of the property of such corporation from state or county taxes.

Pursuant to said act, Col. Harris as legal adviser to Mr. Ryan, Director of Air Craft Production, on July 25, 1918, suggested the formation of a Spruce Corporation under the laws of the State of Washington, and suggested the sale of the property now under consideration in this suit to such "corporation directly for its capital stock." (Exhibit 16.)

After certain correspondence between Col. Disque and Mr. Ryan, the plan of forming the Spruce Corporation under the laws of Washington was determined upon. (Exhibits 17 and 18). The plan decided upon was to organize a state corporation with a capital of ten millions, sell the Siems-Carey-Kerbaugh contract and the properties and interest acquired by the United States thereunder, to the corporation at *net cost to the United States*; to call a one per cent payment on the subscribed capital stock, the corporation to issue its bonds or debentures, the same to be purchased by the United States and the Allied Governments, the United States to assign enlisted men to work for the corporation but the corporation to pay them the difference between army pay and current wages. (Exhibit 18).

On August 21, 1918, the Spruce Corporation was so formed under the laws of the State of Washington. The trustees were four civilians and three army officers. (Exhibit 1, Record p. 97).

The objects of the corporation were comprehensive, covering almost every business or activity permissible to a private business corporation, such as

to engage in the business of air craft production, timber and lumber production, milling, real estate, licenses and incorporeal rights, shipping, bond issue, its own stocks, stocks of other corporations, transportation, hotels, restaurants, places of amusement, docks, warehouses, elevators, terminal facilities, reservoirs, pipe lines, water systems, railroads of all kinds, telephone, telegraph and wireless plants, water, electric and light systems, “and in general to carry out a general manufacturing, selling, transportation, light and power business, and to do any and all acts which may be necessary, convenient or desirable for carrying out any of the corporate purposes herein set forth.”

The capital stock was ten million dollars (100,000 shares at \$100 each); time of existence was fifty years and place of business Vancouver, Clarke County, State of Washington. (Exhibit 1).

The first meeting of incorporators, stockholders, and trustees, was held on August 21, 1918. Stock was subscribed as follows:

United States.....99,993 shares,
and each of the seven trustees subscribed for one share.

The usual by-laws of private corporations were adopted, with the usual officers.

An agent for the State of Washington and one for the State of Oregon were appointed “upon whom

service of process can be made in behalf of the corporation.”

A call for payment of one per cent of the subscribed stock was made.

The President of the corporation was authorized to acquire certain timber tracts at a price not greater than \$635,000. (Exhibits 2, 3, 4, 5, 6, 7 and 8).

On October 10, 1918, pursuant to a resolution of the Board of Trustees, passed September 24, 1918, (Exhibit 12) the Spruce Corporation purchased and the United States transferred and conveyed to the Spruce Corporation the Siems-Carey-Kerbaugh contract, and all lands, railroads, mill, and property acquired under the contract, the same being principally the property involved in this suit. The conveyance was by deed reciting a valuable consideration, to-wit, *net cost* of the property to the United States. The deed recites that the United States does by these presents “bargain, sell, assign, transfer, convey and set over unto said United States Spruce Production Corporation, grantee, its successors and assigns, the following described property,” being most of the property involved in this suit.

The habendum clause is “TO HAVE AND TO HOLD all and singular the above described property, contracts, rights, and privileges unto said grantee, its successors and assigns forever.”

The transfer is to be effective as of September 1, 1918, the United States “to receive and collect for

all shipments of lumber made prior to said date and the grantee to receive and collect for all shipments made on and after said date.” (Exhibit 24).

At the meeting of the Trustees of the Spruce Corporation held September 24, 1918, a resolution to issue the corporation’s participating debentures to the amount of ninety millions was passed. (Exhibit 12) (The Record, page 73, is incorrect in stating that these were *not* participating debentures. One of these debentures is Exhibit 15).

The plan was to sell these debentures to the United States and to the Allied Governments, but in fact only twenty-five million were issued and all purchased by the United States. (Exhibits 17, 18, 20, 21, 22) (Record, p. 79).

In payment for this twenty-five million dollars of debentures the United States paid to the Spruce Corporation fifteen million dollars in cash and applied the balance as a set-off against the value of the property which came into the Spruce Corporation from the United States through the transfer above mentioned. (Record, pp. 88 and 91).

On November 1, 1918, the Articles of Incorporation were amended by limiting the objects as follows:

“ARTICLE II

“The objects and purposes for which this corporation is formed are as follows:

“The purchase, production, manufacture, and

sale of air craft, air craft equipment or materials therefor, and to build, own and operate railroads in connection therewith, and in general to do all acts and things which may be incidental to the carrying out of the foregoing purposes or to the exercise of the foregoing powers or which may be necessary, advantageous, desirable, or convenient therefor." (Exhibit 10).

The corporation thereafter functioned, contracted, purchased and sold properties as any private business corporation, its business being conducted by its Board of Trustees and its officers elected by its board.

After the armistice, its activities have been principally directed to liquidating and closing its affairs.

At the time of the trial it had paid the United States on the twenty-five million debentures purchased by the United States, all but \$5,338,667.09, in addition to which it had current indebtedness aggregating \$28,482.47, and a stock liability of \$100,000. (The amount actually paid in on stock subscriptions).

The Spruce Corporation then had assets of book value of \$11,953,904.57. (Record, p. 93).

After the armistice the Spruce Corporation did such work as was necessary to preserve the property and in a measure complete it. It, however, also entered into a ten-year contract with the Puget Sound Mills and Timber Company. (Exhibit A). This contract is dated February 14, 1921, and provides for the use by the Timber Company of the Spruce Corpo-

ration's railroad for a period of ten years in hauling logs, estimated to be three hundred million feet, the Spruce Corporation to receive twenty cents per car per mile for both empty and loaded cars, and provides that in the event the railroad should become a common carrier, the tariff rates of the Washington Public Service Commission or the Interstate Commerce Commission should govern. (Exhibit A).

The Spruce Corporation also entered into other logging contracts after the armistice in which the corporation was to receive compensation. (Exhibits B and C; Record p. 80). It also entered into a contract with Clallam Lumber Company under date of August 25, 1920, by which the Lumber Company sold to the Spruce Corporation certain down timber for three dollars per thousand, the same to be paid for monthly as removed and at least one million feet to be removed each month. (Record p. 81). The Spruce Corporation, after a few months, sold this timber to Erickson for five dollars per thousand, except hemlock, which was sold at two dollars per thousand. (Record p. 82).

The railroad in question is thirty-six miles long, with a right-of-way 100 feet wide. (Record, 77-82).

The mill site covers approximately 100 acres and was planned for air craft manufacture, but by certain changes could be used to manufacture commercial lumber. (Record pp. 78, 83).

Each Trustee assigned his share of stock to the

United States in the form set forth on page 84 of the Record. This assignment was in fact an assignment of the Trustees' right to receive money and dividends on his stock.

The corporation at all times employed a large number of civilians in addition to the enlisted soldiers. (Record p. 97).

After the armistice the Spruce Corporation acquired further rights-of-way. (Record pp. 85-86).

The Spruce Corporation was duly "licensed and authorized to transact business in the State of Washington, and had in all respects complied with the laws of that state entitling it to transact business in that state." (Complaint Par. II, Record p. 3).

The Spruce Corporation was organized and created under the laws of the State of Washington and is a citizen of that state, (Complaint Par. I; Record p. 2) and has been conducted and operated as a private business corporation organized under the laws of the State of Washington.

The United States has never advanced to the corporation any money. It subscribed for 99,993 shares of stock, paid \$100,000 on its subscription and purchased twenty-five million of the corporation's bonds, for all of which it paid in money and property, (Record pp. 88 and 91) and all of which have been repaid by the corporation except \$5,338,667.09. The corporation owes current debts of \$28,482.49 and has

assets of book value of approximately twelve million dollars. (Record pp. 92-93).

The sole interest of the United States in the Spruce Corporation is that of a stockholder owning all its capital stock, and the holder of its bonds to the amount of a little over five million dollars. The title to and possession of all the property assessed for state and county taxes and involved in this suit, during the period for which taxes have been assessed, has been in the Spruce Corporation, and was paid for from the proceeds of the sale of its debenture bonds.

There is no question of any invalidity or irregularity in the tax assessment sought to be enjoined, but the sole contention by plaintiffs is that the property is exempt from state taxes on the ground that it in fact belongs to the United States though possessed and title held by the Spruce Corporation.

At the close of the testimony, the defendants again objected to the jurisdiction of the Federal Court and moved a dismissal of the action on the following grounds:

- (1) That the Court has no jurisdiction.
- (2) That the United States is neither a necessary nor a proper party.
- (3) That this cause of action does not arise under any law or the constitution of the United States, and the suit is between citizens of the same state.

Without waiving their objection to the jurisdiction, defendants further moved that this cause be dismissed on the ground that the complaint does not state facts sufficient to constitute a cause of action or to entitle complainants to the relief sought or any relief, and on the ground that the evidence introduced fails to show any cause of action and fails to show the plaintiffs entitled to the relief sought or to any relief whatever. (Record p. 105).

The case was then argued and taken by the Court under advisement.

The Court, on June 28, 1922, filed its memorandum decision to the effect that the property in question was exempt from state taxation, (Record p. 38 and following) and on August 18, 1922, signed and caused its decree to be entered, decreeing that the property attempted to be taxed was not subject to taxation, quieting the plaintiffs' title to the property against the taxes, removing the tax assessment as a cloud from plaintiff's title, perpetually enjoining the appellants from assessing or taxing the property and from attempting to collect the taxes in question, and with costs to the appellees. (Record pp. 47-48).

An exception to this decree was allowed the appellants.

Thereafter the appellants filed their assignment of errors and took the usual and necessary steps to appeal to this Court from said decree. (Record p. 49 and following).

ARGUMENT.

While appellants filed assignment of errors in much detail (Record p. 49), the points raised by the assignments and to which this discussion will be confined, are the following:

POINT I.

The United States District Court did not have jurisdiction of this suit.

POINT II.

The physical properties of the Spruce Corporation, under the facts of this case, were not exempt from the state and county taxes assessed by Clallam County and its taxing officers and sought by this suit to be enjoined.

POINT I.

THE FEDERAL COURT IS WITHOUT JURISDICTION.

The United States' interest in the Spruce Corporation is that of a stock and bond holder and it is neither a necessary or a proper party plaintiff to this suit.

Bank of U. S. v. Planters Bank of Georgia,
6 L. Ed. (U. S.) 244.

Judge Marshal in the above case says:

“Many states of the Union which have an interest in banks are not sueable even in their own courts. * * * As a member of a corporation the government never exercises its sovereignty.

It acts merely as a corporator and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporation act.”

(That is, by the laws of the State of Washington.)

The above case also holds that suits by or against The Bank of the United States in which the United States owned stock, were not suits against the United States.

Hawes v. Oakland, 26 L. Ed. (U. S.) 827, holds that a stockholder cannot maintain an action without showing that he “has exhausted all means within his reach to obtain within the corporation its redress of his grievance.” (P. 832).

To the same effect, *Euity Rule* No. 27.

Jellenik v. Mining Co., 44 L. Ed. (U. S.) 647, holds:

“As the domicile of the company is and must be in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is whenever it is sought by suit to determine who is its real owner.” (P. 651).

Barrow Steamship Co. v. Kane, 42 L. Ed. (U. S.) 964, holds:

“There is a *conclusive* presumption of law that the persons composing the corporation are citizens of the same state with the corporation.” (P. 966).

So, in the case at bar, the United States, a stockholder, is *conclusively* presumed for jurisdictional purposes, to be a citizen of the State of Washington.

Fitzgerald v. Mo. Pac. Ry. Co., 45 Fed. Rep., 812, holds a corporation is amenable to the laws of the state creating it. (P. 815).

“The owner of all the stock and bonds of a corporation does not own the corporate property. The corporate property which includes all rights of action and claims for damages, belongs to the corporation and is subject to the management and control of its board of directors and if it be conceded that the defendant owns all the stock and bonds of the Denver Company, that fact gives it no title to or interest in the right-of-way or other property of that company, which it can make the basis of an action or plea in its own behalf.” (Pp. 818-819).

This case also holds that in case of doubtful jurisdiction, jurisdiction should be refused.

In re Greenleaf, 56 N. E. (Ill.), 295, the court says:

“That tangible property of the corporation and the shares of stock therein are separate and distinct kinds of property and belong to different owners—the first being the property of the artificial person, the corporation; the latter the property of the individual owner thereof,”

and holds that the shares of stock may be taxed in one jurisdiction and the physical property in another.

The Spruce Corporation is a separate entity and a citizen of the State of Washington. It is bound

by its contracts and is capable of suing and being sued. Its property can be subjected to execution. If its property is threatened by execution or wrongful seizure, the United States would have no standing to sue for injunction. The fact that the State or Clallam County are threatening to seize the property for taxes does not change the situation. It neither makes the United States a necessary or proper party nor involves the construction of any law of the United States.

See

U. S. v. Strang, 254 U. S. 491; 65 L. Ed. 368.
Sloan Ship Yards Corporation, Astoria Marine Iron Works v. U. S. Shipping Board Emergency Fleet Corp., and *Fleet Corporation v. Wood, Trustee in Bankruptcy*, 257 U. S. p.—; 66 L. Ed. (U. S.) p..

This Circuit, in the recent case of *U. S. v. Matthews*, (Fed. Rep. Adv. Sheets, Vol. 282, No. 1, Oct. 6, 1922, p. 266), would seem to settle this question so far as this Circuit is concerned. If, as decided in that case, the United States has not sufficient interest to maintain a suit to recover money paid out by the Fleet Corporation, it would seem that it could not join in a suit for the purpose of giving the Federal Court jurisdiction.

In the late case from the Third Circuit, of *Manufacturers L. & I. Co. v. United States S. B. E. Fleet Corporation* (Advance Sheets Federal Reporter, Vol.

284, page 231), the Court holds that a suit is maintainable against the Fleet Corporation; that it and not the United States is the real party defendant. The Court also holds (page 236) that the Fleet Corporation having requisitioned the fee of certain lands, that such lands “then belonged absolutely to the Fleet Corporation.”

This cause does not arise under the laws of the United States in the sense that a Federal Court would have jurisdiction.

The constitution is in no way involved nor is a *construction* of any law of the United States involved. The Acts of Congress, pleaded in the complaint, their meaning and purposes as claimed, are not put in issue.

The sole question raised is one of fact as to the ownership of the properties taxed. There is no sound reason to have this question of fact presented to a Federal Court.

If a Federal Law is involved, it is only as it may tend to prove this fact of ownership. No disputed construction is involved.

The source of the money that bought the stock and bonds, the activities of the United States Officers, the activities of the Spruce Corporation, are all facts and involve no construction of Federal Law.

The trial court did not maintain jurisdiction on this ground, but solely on the ground that the United

States was a necessary and proper party. (Record, p. 40).

Blackburn v. Mining Co., 44 L. Ed. (U. S.) p. 276, holds that the application of the Federal statute must not only be involved “but that the controversy was determined by a *construction* put upon the statute adverse to the contention of one of the parties.” (P. 283). That there must be a denial of right arising out of the construction of a Federal Statute.

To the same effect see

Shoshone Mining Co. v. Reutter, 44 L. Ed. (U. S.) 864;

Western Union Tel. Co. v. Ry. Co., 44 L. Ed. (U. S.) 1052;

Little York Gold W. W. Co. v. Keyes, 24 L. Ed. (U. S.) 656;

Bankers, etc., Co. v. Minneapolis, etc., R. Co., 48 L. Ed. (U. S.) 484.

In the *Fitzgerald* case, *supra* (45 Fed. Rep., 812) the court says (on page 819):

“If there is no dispute between the parties as to the meaning of the Act of Congress, there is no Federal controversy between them and no cause for removal. The Supreme Court has settled the rule on this subject.”

In the case of *Arkansas v. Choctaw, etc., R. Co.*, 134 Fed., 106, it is held that any doubt must be resolved against the jurisdiction and quotes from Judge Brewer as follows:

“When a proposition has once been decided by the Supreme Court, it can no longer be said that in it there still remains a Federal question.”

This Circuit has also held the same doctrine in the case of *Montana Ore Producing Company v. Boston, etc., Mining Co.*, 85 Fed., 867.

In the case of *Miller v. Illinois Central R. Co.*, 168 Fed., 982, on page 987, the court says:

“It does not appear that a construction of the act known as the ‘Employers Liability Act’ of Congress is in any way involved in this case. It seems to be a case where the decision will depend entirely upon the facts of the case as applied to the law. The mere application of an act of Congress to a case gives no right of removal.”

The Spruce Corporation is a creature of the laws of the State of Washington—a citizen of that state. No constitutional question or construction of Federal law is involved. The United States is not a proper party plaintiff. On what principle can a Federal Court have jurisdiction?

In *Head & Armory v. The Provident Ins. Co.*, (2 Cranch, 127), Chief Justice Marshall said:

“A state corporation is a creature of state law. Its qualities and disabilities are ‘what the incorporating act has made it—to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur to ascertain its powers.’ ”

In the *Dartmouth College* case (4 Wheaton, 636), it is said:

“Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it.”

In the *Dandridge* case (12 Wheaton, 64), it is said:

“Corporations created by statute must depend both for their powers and the mode of exercising them upon the true construction of the statute itself.”

In the *Earle* case (13 Peters, 519, opinion, 587), Chief Justice Taney said:

“A state corporation can do no acts ‘except such as are authorized by its charter; and those acts must also be done by such officers or agents, and in such manner as the charter authorizes.’ ”

And on page 588:

“It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplating of law, and by force of the law; and when that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.”

The effort of appellees to show in the case at bar that the Spruce Corporation was controlled and its business operated under United States officers and agents, and that the United States appointed its board of directors, was futile as the acts of this corporation must be done by its officers and agents and in the manner authorized and prescribed by the laws of Washington. The fact that it confined, if it did

confine, its activities to furthering the interests and purposes of its dominant stockholder, the United States, would not change the law; such acts are the acts of a creature of state law and are governed and limited by that law.

How is it permissible for this creature of state law, this citizen of the State of Washington, to be singled out from other citizens of Washington as a class by itself, and be allowed to present its controversies to a Federal Court?

Why should such a citizen be relieved from the obligations imposed by the same law on other citizens to support the state administration that gives its property protection?

The incorporation laws of the State of Washington are full and complete.

Remington's 1915 Code, Sec. 3677 and following.

Superior Courts of the State of Washington have jurisdiction of suits involving "title to real estate, or the legality of any tax."

Rem. 1915 Code, Sec. 15.

Suits to enjoin tax collection must allege and prove tender of taxes justly due.

Rem. Code, 1915, Sec. 955.

The State Board of Taxing Commissioners have

“general supervision of the system of taxation throughout the state,” with very broad powers.

Rem. Code, 1915, Sec. 9084, and following.

All property in the State of Washington is subject to taxation.

Rem. Code, 1915, Sec. 9091.

Suits by a state corporation must allege and prove payment of last annual license fee to the State.

Rem. Code, 1915, Sec. 3715.

If the Spruce Corporation engages in hazardous work it is subject to the *State Workmen's Compensation Law*, and must pay the State a percentage of its pay roll.

Rem. Code, 1915, Sec. 6604 and following.

If it operates its railroad as a common carrier it is subject to and governed by the *Public Service Commission Law* of the State of Washington.

Rem. Code, 1915, Secs. 8626-1 and following.

In the recent case of *King County, State of Washington, et al, appellants, v. U. S. Shipping Board Emergency Fleet Corporation, appellee*, numbered in this Court 3851, and decided September 5, 1922, the jurisdiction was not raised, and the Fleet Corporation was not a citizen of the State of Washington.

POINT II.

THE PHYSICAL PROPERTIES OF THE SPRUCE CORPORATION ARE NOT EXEMPT FROM THE STATE AND COUNTY TAXES ASSESSED BY CLALLAM COUNTY AND ITS TAXING OFFICERS.

1. *Exemption from State taxation of a Federal Agency can only arise by necessary implication or by express Congressional declaration.*

Such necessary implication depends not upon the fact of the agency, but upon the character and *necessary effect* of the tax. From a tax which deprives the agent of the power to serve the Government, or directly and necessarily obstructs the exercise of that power, there is a necessary implication of exemption. From any other tax there is no such implication of exemption.

The tax upon the operation or right to function of the agent has the necessary effect of destroying or obstructing the power of the agent to serve, hence is impliedly prohibited. A tax upon the local property of the agent has no such necessary effect, hence is not impliedly prohibited and the exemption, if any, must arise from express Congressional declaration. This distinction runs through all the decisions.

McCulloch v. Maryland (4 Wheat., 316; 4 Law Ed., 579-600-609), is the leading case. It involved a stamp tax on notes issued by the Maryland branch of the old United States Bank, a corporation created by act of Congress. The Maryland law sought to pro-

hibit the issuance of such notes except upon stamps for which must be paid to the state a graduated tax according to the denomination of the notes, and to prohibit the issuance of such notes except in specified denominations, not prescribed by the act of Congress creating the bank. The Federal Supreme Court, speaking through Chief Justice Marshall, held in substance that this was an attempt to tax the operations of the bank and to control or impede its right to function, as a governmental agency, and that the Maryland law was therefore unconstitutional and void. In his final summary Chief Justice Marshall said:

“This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operation of an instrument employed by the Government of the Union to carry its powers into execution. Such a tax must be unconstitutional.”

Osborn v. Bank of United States, 9 Wheat., 738-867; 6 Law Ed., 204-235, involved a law of the State of Ohio imposing upon each office of discount and deposit of the Bank of the United States within that state an annual occupation tax of \$50,000. The Court, again speaking through Chief Justice Marshall, held in substance, that the capacity of discount and deposit were essential to the operation of the bank and that therefore the exemption from a state tax on these

operations, though not expressed by the act of Congress, was necessarily implied. Noticing the alleged resemblance between the bank and a governmental contractor, Chief Justice Marshall said:

“Can a contractor, for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed, or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true, that the property of the contractor may be taxed as the property of other citizens; and so may the local property of the bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under state control.”

This language clearly recognizes the distinction upon which we insist, namely, between a tax upon the property of a governmental agent and a tax upon the action or right to function of such agent. This distinction, as said by Justice Strong in the *Peniston* case, “has ever since been recognized.”

Thompson v. Union Pacific R. Co., 9 Wall., 579; 19 Law Ed., 792-798, was a suit to enjoin a state tax on the railroad's property. The railroad was incorporated by the Territorial Legislature and State Legislature of Kansas. Chief Justice Chase reviews prior decisions and finds in substance that exemption from state taxation of corporations employed as governmental agencies have been sustained in two classes of cases: (1) where the corporation was created under act of Congress and the tax was sought to be imposed on its operations or right to function, as in

McCulloch v. Maryland, and, (2) where the act under which the corporation was formed expressly exempted the corporation or its property from state taxation or limited such taxation, as in *Bradley v. People*, 4 Wall., 459; 18 L. Ed., 433. He says:

“But we are not aware of any case in which the real estate, or other property of a corporation not organized under act of Congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government.”

He adds:

“We do not think ourselves warranted, therefore, in extending the exemption established by the case of *McCulloch v. Maryland*, beyond its terms. We cannot apply it to the case of a corporation deriving its existence from state law, exercising its franchise under state law, and holding its property within state jurisdiction and under state protection.

“We do not doubt the propriety or the necessity, under the Constitution, of maintaining the supremacy of the General Government within the constitutional sphere. We fully recognize the soundness of the doctrine, that no state has a ‘right to tax the means employed by the Government of the Union for the execution of its powers.’ But we think there is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means.

“No one questions that the power to tax all property, business and persons, within their respective limits, is original in the states and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National Government; but it will be safe to conclude, in general, in reference to persons and state corporations employed in government service, that when Congress has not interposed to protect their property from state taxation, such taxation is not obnoxious to that objection.

“*Lane County v. Oregon* (*ante*, 105);
“*Bank v. Kentucky* (*ante*, 701).

“We perceive no limits to the principle of exemption which complainants seek to establish. It would remove from the reach of state taxation all the property of every agent of the Government. Every corporation engaged in the transportation of mails, or of government property of any description, by land or water, or in supplying materials for the use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption. The amount of property now held by such corporations, and having relations more or less direct to the National Government and its service, is very great. And this amount is continually increasing; so that it may admit of question whether the whole income of the property which will remain liable to state taxation if the principle contended for is admitted and applied in its fullest extent, may not ultimately be found inadequate to the support of the state governments.”

Union Pacific R. R. Co. v. Peniston, 18 Wall., 550; 21 Law Ed., 787-791, was also a suit to enjoin a state tax on the property of the railroad in the state. The railroad corporation was created by Congress, as an agent of the general government, design-

ed to be employed and actually employed in the service of the government, both military and postal. It was aided by a land grant and bonds advanced to it by the government, and the government expressly had the right to name five of its directors. The Court said:

“That the taxing power of a state is one of the attributes of sovereignty; that it exists independently of the Constitution of the United States, and underived from that instrument; and that it may be exercised to an unlimited extent upon all property, trades, business and avocations existing or carried on within the territorial boundaries of the state, except so far as it has been surrendered to the Federal Government, *either expressly or by necessary implication*, are propositions that have often been asserted by this court. And in thus acknowledging the extent of the power to tax belonging to the states, we have declared that it is indispensable to their continued existence.” (*Italics ours.*)

After reviewing the *Thompson* case the court said:

“It may, therefore, be considered as settled that no constitutional implications prohibit a state tax upon the property of an agent of the government merely because it is the property of such agent. A contrary doctrine would greatly embarrass the states in the collection of their necessary revenue without any corresponding advantage to the United States. A very large proportion of the property within the states is employed in execution of the powers of the government. It belongs to governmental agents, and is not only used, but is necessary for their agencies. United States mails, troops and munitions of war are carried upon almost every railroad;

telegraph lines are employed in the national service. So are steamboats, horses, stage coaches, foundries, ship-yards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents of the General Government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the states it is manifest the state governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the United States in the General Government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that state taxation of such property is impliedly prohibited."

Referring to *McCulloch v. Maryland* the Court said:

"The institution was prohibited from issuing notes at all except upon stamped paper furnished by the state, and to be paid for on delivery, the stamp upon each note being proportioned to its denomination. The tax, therefore, was not upon any property of the bank, but upon one of its operations; in fact, upon its right to exist as created. It was a direct impediment in the way of a governmental operation performed through the bank as an agent. It was a very different thing, both in nature and its effect, from a tax on the property of the bank. No wonder, then, that it was held illegal. But even in that case the court carefully limited the effect of the decision."

The court thus makes plain the distinction upon which we insist here, namely, a tax on the operations

or right to function is prohibited by necessary implication; but a tax on the local property of the corporate agency is not prohibited by implication. It follows that such a tax can only be prohibited by express declaration of Congress. The court said:

“This distinction, so clearly drawn in the earlier decisions, between a tax on the property of a governmental agent, and a tax upon the action of such agent, or upon his right to be, has ever since been recognized.”

The court further said:

“It is, therefore, manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of the power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers.”

Justice Field dissented in this *Peniston case*, but in the next case which we shall notice he receded from his former position and said: “But on further consideration I have come to the conclusion that the rule laid down in the *Thompson case* is the true and sound rule.”

County of Santa Clara v. Southern Pacific R. Co., 18 Fed., 385, involved county taxes levied upon the franchises and property of the defendant rail-

road corporations formed under the laws of the State of California. Two of these companies, with consent of the Legislature of California, were selected as special agents of the Federal Government and received grants of power and privileges from the Federal Government as postal and military roads, not possible under the original organization. They contended that the power to tax their franchises involved the power to destroy the companies and urged that the tax was therefore void.

The opinion was written by Justice Field. Following the rule in the *Thompson case* he said:

“The state, it is conceded, cannot use its taxing power so as to defeat or burden the operation of the general government. And when the government has itself created the instrumentality used, its exemption from a state taxation necessarily follows. But we are of the opinion yielding to the decision cited, that when the instrumentality is the creation of the state,—a corporation formed under its laws,—and is employed or adopted by the general government for its convenience, although to enlarge its use and render it more available additional privileges and benefits are conferred by the government upon the corporation, it remains subject to the taxing power of the state, unless Congress declares it to be exempt from such power. Congress can undoubtedly exempt any agencies it may employ for services to the general government from such taxation as will in its judgment impede or prevent their performance. Occasions may arise hereafter, especially in time of war, where the necessities of the Federal Government will require such exemption of the roads of the companies, and of their franchises

and appurtenances, to be declared and enforced; the exemption to continue until the necessities calling for it shall cease. But as yet Congress has not declared any such exemption either of their property or of their franchises, and we therefore think that none exists.”

The above language is directly applicable here. The Spruce Corporation is organized under the laws of the State of Washington. Therefore, “it remains subject to the taxing power of the State, unless Congress declares it exempt from such power.” This is especially true where, as here, the tax is purely a property tax and not a tax on the franchise.

Central Pacific Railroad Co. v. California, 162 U. S., 91-128; 40 Law Ed., 903-915, involved the validity of a tax on the railroad’s franchise included in its return with its other property for taxation. The railroad company was organized under the laws of the State of California and derived its franchise from those laws. It appeared also that it had as an agency of the Federal Government an additional franchise from the Federal Government. It was contended that the whole tax was void in that it included a tax on the Federal franchise which was exempt from State taxation. The Court, speaking through Chief Justice Fuller, held that the State franchise was not exempt from taxation, and that in the absence of a showing to the contrary the franchise taxed was presumed to be that which the State could legally tax, namely, the State franchise and not the Federal franchise. The tax was held valid.

Choctaw, Oklahoma & Gulf R. Co. v. Mackey, (U. S. Supreme Court Adv. Opinions No. 16, July 1st, 1921, p. 639) is the most recent expression of the Supreme Court of the United States on this question of state taxation of property of Federal agencies. The railroad there in question served certain coal mines situated upon lands leased from the Choctaw Indians and it was conceded that the railroad was used by the Government as an agency in carrying out its policy toward the Indians. The Court, following the rule in the *Peniston* and other cases, held the state tax on the railroad's property valid. The Court said:

“And even though it be granted that the Federal Government utilized the railroad as an instrument in working out its policy toward the Indians, the tax upon the railroad property would be none the less valid.”

It is thus plain that the Supreme Court of the United States in its latest utterance has evinced no disposition to recede from the original distinction made in *McCulloch v. Maryland*, between a tax upon the operations of a government agency or its rights to function, and the tax upon the property of such an agency located within the taxing state, and still holds that the latter is not exempt from taxation in the absence of a specific declaration of Congress to that effect.

This distinction between taxation of the operations or right to function of the governmental agency and taxation of its local property is also clearly

recognized in the *Telegraph* cases which were cited by appellees in the trial court as showing that the “means” employed by the Federal Government cannot be taxed by the states.

Williams v. Talladega, 226 U. S. 404; 57 Law Ed. 275, involved a municipal license fee in the nature of an occupation tax of \$100 per year upon the right of the Western Union Telegraph Company to transmit messages. In consideration of permission conferred by Act of Congress to construct and maintain its lines upon the military and post roads of the United States, the company was required as an instrumentality of the Federal Government to transmit messages for the government at reduced rates and give such messages priority over other business.

The license tax did not except from its operation such Federal business. The ordinance was held void as an attempt to tax the right of the company to function as a governmental agency. But the Court, speaking through Justice Day, after reviewing the prior telegraph cases, said:

“These cases, taken together, establish the proposition that the privilege given under the terms of the act to use the military and post roads of the United States for the poles and wires of the company is to be regarded as permissive in character, and not as creating corporate rights and privileges to carry on the business of telegraphy, which were derived from the laws of the state incorporating the company, and that this permissive grant did not prevent the state from taxing the real or personal property belonging to the company within its borders, or

from imposing a license tax upon the right to do a local business within the state.”

Western Union Tel. Co. v. Texas, 105 U. S., 530; 26 Law Ed., 1067, involved an occupation tax which imposed a specific tax on each message transmitted by the company. This was in addition to the usual taxes on the real and personal property of the company within the state. The Federal Supreme Court held that in transmitting messages from points within to points without the state the company was an instrument of interstate commerce, and that in transmitting messages for the Federal Government it was a government agency, and that therefore neither interstate messages nor messages for the government could be subjected to the occupation tax. But, referring to the Act of Congress giving to the company the right to use military and post roads, the Court said:

“The Western Union Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and business. The precise question now presented is, whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the state, or sent by public officers on the business of the United States.”

Western Union Tel. Co. v. Attorney General,

125 U. S., 530; 31 Law Ed., 790, likewise sustains our position that an exemption from state taxation of the *property* of a corporation employed as a governmental agency is never implied though such exemption is implied as to its operations or right to function. The Court said:

“While the state could not interfere by any specific statute to prevent a corporation from placing its lines along these post roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the state for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of any other state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary for its support.”

A clearer recognition of the distinction between taxation of the operations or right to function of a government agency and taxation of its local property, than that made in these telegraph cases can hardly be conceived. They all hold that the operations or right to function of the governmental agency are the means employed by the government, without which the agent cannot serve the government; that state taxation of such operations or rights has a direct and necessary tendency to obstruct or impair the agent's power to serve, hence it is prohibited by necessary implication, but that taxation of the local

property of the agency in the same manner as other property in the state, has no such necessary tendency, hence is not impliedly prohibited.

It is no answer to say, as was said by the trial court, that the properties of the Spruce Corporation are “the only means and instrumentality by which the purpose and employment could be carried out.” Obviously the timber lands, mill and railroad of the Spruce Corporation are no more the “means” employed by the government for the production of airplanes, than were the local tracks and rights-of-way of the railroad in the *Thompson* and *Peniston* cases the “means” employed by the government in the transportation of troops, munitions and mails. Obviously the property here taxed was no more the “means” employed for the government’s purpose than were the local poles, wires and real estate of the telegraph companies the means employed for the messages in the *Telegraph* cases.

Obviously, equal taxation of the property here involved with other like property in the State has no more direct or necessary tendency to obstruct or destroy the power of the Spruce Corporation to produce timber for airplanes than the tax on the railroad’s tracks and rights-of-way, involved in the *Thompson*, *Peniston* and other railroad cases, had to obstruct or destroy the power of the railroads to carry government troops, war munitions or the mails. It is no more true that this corporation could not produce airplane lumber without its timber lands than it was that the railroads could carry govern-

ment troops, munitions and mails without their tracks and rights-of-way, or that the telegraph companies could transmit government messages without their poles and wires.

It is too plain for cavil that all these cases hold that the “means” employed by the government are the corporations themselves with their right to be, to operate and to function; that the direct and necessary effect of a state tax on any of these rights would be to obstruct or destroy the power to serve, hence it is impliedly prohibited, but a tax on the local property commensurate with other like property in the state has no such direct or necessary tendency, hence is not impliedly prohibited.

This is the criterion laid down by Chief Justice Marshall in *McCulloch v. Maryland* over a hundred years ago and consistently followed ever since in an unbroken line of decisions. Congress must be presumed to have known of these decisions and that the rule they announced had been followed for a century when it authorized the creation under the State law, and the employment of the Spruce Corporation as a governmental agency. Had it intended or desired to exempt the local property of that corporation from State taxation it must be assumed that in the act authorizing the employment of such agencies it would have so declared. It did not so declare and no implication of such an intention can be reasonably indulged.

In practically every case in which the Federal

Supreme Court has held that the “means” employed by the Federal Government are impliedly exempt from state taxation, *the term “means” is defined as the corporate agency itself, its right to operate, to function and to be.* In none of them is it used as including the local physical property of the agency. In every such case such local property is *expressly excluded* from that term.

In the trial court considerable stress was laid, both by counsel for appellees and the Court, on the often-quoted dictum of Chief Justice Marshall in *McCulloch v. Maryland* that “the power to tax involves the power to destroy.” The answer is found in the opinion of Judge Field in *County of Santa Clara v. Southern Pacific R. Co.*, 18 Fed., 365, above cited. It is true that in that case the tax on the property of the railroad was held invalid, not on the ground of exemption, but for gross inequality as compared with the taxes on other property in the state, thus impinging the Fourteenth Amendment of the Federal Constitution. The court held that that amendment declaring that no state shall deny to any person within its jurisdiction the “equal protection of the laws” imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including the power of taxation. Judge Field said:

“Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly are, and always will be, more or less inequalities in the operation of all general legis-

lation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result. Absolute equality may not be attainable, but gross and designed departures from it will necessarily bring the legislation authorizing it within the prohibition. The amendment is aimed against the perpetration of injustice, and the exercise of arbitrary power to that end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminatory taxation, leveled against special classes, has been the fruitful means of oppressions, and the cause of more commotions and disturbance in society, of insurrections, and revolutions, than any other cause in the world. It would, indeed, as counsel in the *San Mateo case* ironically observed, be a charming spectacle to present to the civilized world, if the amendment were to read, as contended it does in law, 'Nor shall any state deprive any person of his property without due process of law, *except it be in the form of taxation*; nor deny to any person within its jurisdiction the equal protection of the laws, *except it be by taxation*.' No such limitation can thus be ingrafted by implication upon the broad and comprehensive language used. The power of oppression by taxation without due process of law is not thus permitted; nor the power by taxation to deprive any person of the equal protection of the laws."

It is thus made plain that the Fourteenth Amendment constitutes an insuperable bulwark against destruction of a Federal Agency by taxation of its prop-

erty. By guaranteeing equality of taxation it makes it impossible for any state to destroy such an agency by taxing its property without at the same time destroying every other business enterprise in the state and thus destroying itself.

No such inequality is claimed in the case here. The property of the Spruce Corporation is taxed just as other property in the state is taxed.

It is certainly no more true that “the power to tax involves the power to destroy” a Federal agency, than it is that the power to prohibit state taxation involves the power to destroy the state. This is clearly pointed out in the *Thompson* and *Peniston* cases. In the *Peniston* case the Court said:

“A very large proportion of the property within the states is employed in execution of the powers of the government. It belongs to government agents, and is not only used, but it is necessary for their agencies. * * * Were they exempt from liability to contribute to the revenue of the states it is manifest that the state governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the United States in the General Government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of these powers, it has never been decided that state taxation of such property is impliedly prohibited.”

It is the plain purport of these and many other decisions of the Federal Supreme Court that the intention to exercise a power fraught with such potential disaster to these states should never be implied ex-

cept where the implication is positively essential to the service of the government by its agents. It is equally plain that unless the line of implied exemption from taxation be drawn between taxation of the right of the agent to operate, to function, or to be, and taxation of its local property, where it has been consistently drawn by that Court for a century, there is no line. It is only safe and sane to continue to hold, as has been so long held, that if Congress intends to exempt such property from state taxation it must say so and when it has not so declared, no such exemption shall be implied.

We submit that unless the property here in question was actually the property of the United States and merely held in trust for the government by the Spruce Corporation, it was not exempt from State taxation.

2. The property of the Spruce Corporation was not owned by nor held in trust for the United States.

That all of this property during the years for which it was taxed stood in the name of the Spruce Corporation by deed absolute, without reservation, condition or defeasance of any kind is an undisputed fact. (Exhibit 24). That the Spruce Corporation actually paid the full consideration therefor from money realized on the sale of its own debenture bonds is also an undisputed fact. (Record, pp. 88 and 91). That the Spruce Corporation is a separate entity, not endowed with the sovereignty of the United States; that it is not the government nor a

part of the government of the United States, but is a private corporation and as such subject to suits both on contracts and tort, are things now conclusively established by decisions of the Federal Supreme Court, and must per force be admitted.

United States v. Strang, 254 U. S. 491; 65 L. Ed. 368;

Sloan Shipyards Corp. v. U. S. Shipping Board Em. F. Corp.; *Astoria Marine Corp. v. Fleet Corp. v. Wood, Trustee*, 257 U. S. 66 L. Ed.....; No. 14 Adv. Op. U. S. Sup. Ct., July 1, 1922, p. 456;

Panama R. Co. v. Minnix, 282 Fed. Rep. Adv. Sheets, No. 1, p. 47;

United States v. Matthews, 282 Fed. Rep. Adv. Sheets No. 1, p. 266.

In the face of these admitted, undisputed and adjudicated facts the trial court said that “in the instant case the property is the property of the United States, held in the name of the corporation, and has not been used in other than for war purposes.” (Record p. 44). This statement is the crux of the trial court’s decision. If it is erroneous a reversal seems inevitable. Let us examine it in the light of the record.

The Spruce Corporation is a separate entity, a corporation organized under the laws of the State of Washington. The legal title of all of this property

at the time it was taxed and during the years for which it was taxed was in that corporation. If, as the court said, it was the property of the United States it must be because of some trust created either *expressly* or by operation of law.

It is elementary that the burden of proving a trust in lands contrary to the apparent legal title, rests upon him who asserts it. Broadly speaking, there are only three kinds of trusts known to the law. These are (a) express trusts, (b) constructive trusts, and (c) resulting or implied trusts.

3 *Pomeroy, Equity Jurisprudence*, (4th Ed.), Sec. 987.

(a) *Express trusts* are “those created by the contract of the parties and intentionally.”

Farrell v. Mentzer, 102 Wash., 629-632;

3 *Pomeroy, Equity Jurisprudence* (4th Ed.)
Sec. 987.

It is the settled law of the State of Washington that “an express trust cannot be proven by parol testimony.” It must be proved by written evidence.

Arnold v. Hall, 72 Wash., 50-52;

Kalinowski v. McNeny, 78 Wash., 681-684;

Croup v. DeMoss, 78 Wash., 128-131-132;

Farrell v. Mentzer, 102 Wash., 629-649-650.

The Federal Courts are of course bound by the construction put upon the laws of the State by the

Supreme Court of the State. This is as true in the attempt to assert a trust as in other cases.

Osterman v. Baldwin, 6 Wall., 116; 18 L. Ed., (U. S.) 730.

There is no written evidence in this case even tending to show that the property here in question is or ever was held by the Spruce Corporation in trust for the United States. The deed from the United States to the corporation is a deed absolutely without reservation, condition or defeasance. It does not mention any trust and the corporation is not even referred to as a trustee. There is no other writing declaring any trust. Even the parol evidence adduced by appellees themselves as to the consideration for the conveyance negatives any trust. The land was actually paid for by the corporation with the proceeds of the sale of debenture bonds of the corporation which were purchased by the United States, and which, so far as they remain unpaid, are still held by the United States. (Record pp. 88, 91-92).

Plainly there is no evidence in this case from which any court can find the existence of an *express trust* for any purpose.

(b) *Constructive trusts* are those raised by the doctrines of equity to effectuate justice “where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the holder of the legal title, and where there is no express or implied written or verbal declaration of the

trust.” All constructive trusts “may be referred to what equity denominates fraud, either actual or constructive, as an essential element, and as their final source.”

3 *Pomeroy, Equity Jurisprudence*, (4th Ed.), Sec. 1044.

Manifestly there is no constructive trust in this case. It is not pretended that the Spruce Corporation acquired title to this property through any fraud or by breach of any duty which it owed to the United States.

(c) *Resulting trusts* are of two types:

First, those arising from gift by will or deed, with an intention *appearing from the face of the instrument* that the legal and beneficial estates are to be separated, but no valid or complete trust being declared, *and no consideration stated*.

3 *Pomeroy, Equity Jurisprudence*, (4th Ed.), Secs. 1033-1035.

Second, these trusts arising where the legal estate is conveyed to one person and the purchase price is paid either in whole or an aliquot part thereof by another.

3 *Pomeroy, Equity Jurisprudence*, (4th Ed.), Sec. 1037.

In each of these types “there is always the element, although it is an implied one, of an intention

to create a trust.” The law raises the trust as a result of this implied intention.

3 *Pomeroy, Equity Jurisprudence*, (4th Ed.), Sec. 1031.

Farrell v. Mentzer, 102 Wash., 620-632-633;

Croup v. DeMoss, 78 Wash., 128-132-133.

There is no evidence in this case to sustain a resulting trust of the first type, namely, those arising by implication from the *terms of a gift* by will or deed. The deed in this case is absolute on its face, states a full consideration and contains no mention of a trust or anything from which a trust can be implied. In such a case no extrinsic evidence is ever admissible to raise a trust, in the absence of fraud or mistake.

3 *Pomeroy, Equity Jurisprudence*, (4th Ed.), Sec. 1036.

The record is equally devoid of sustaining evidence to create a resulting trust of the second type defined by Judge Pomeroy as above noted, namely, that resulting from the payment of the purchase price by one party, the title being taken in the name of another. As in other claims of trust, the burden of proving the trust is upon him who asserts it. Though a resulting trust of this second type may be proven by parol evidence the proof must be of the strongest character. The rule as to *quantum* of proof is thus stated by the same eminent authority:

“Where the trust does not appear on the

face of the instrument of transfer, a resort to parol evidence is indispensable. It is settled by a complete unanimity of decision that such evidence must be clear, strong, unequivocal, unmistakable, and must establish the fact of the payment by the alleged beneficiary beyond a doubt."

3 *Pomeroy, Equity Juris.*, (4th Ed.) Sec. 1040.

See also

Denny v. Holden, 55 Wash., 22-23;

Croup v. DeMoss, 78 Wash., 128-132-133;

Sewell v. Sewell, 109 Wash., 252-255;

Sheehan v. Sullivan, (Cal.) 58 Pac., 543-544;

Barger v. Barger, (Or.) 47 Pac. 702-704;

Catoe v. Catoe, (S. C.) 10 S. E., 1078-1079;

Hatton v. Cunningham, (Ind.) 62 N. E., 644.

A legion of cases to the same effect might be cited but these should suffice.

Appellees not only failed to show that the United States paid the purchase price when this land was conveyed to the Spruce Corporation, but their evidence shows conclusively that the purchase price was paid by the corporation to the United States from the proceeds of the sale of the debenture bonds of the corporation. (Record pp. 88-91). The evidence, so far from establishing a resulting trust in favor of the United States, shows conclusively that the Spruce Corporation actually paid the full purchase price and that the United States by taking the debentures of the corporation which it still holds, became and is a mere creditor of the corporation.

True, the Spruce Corporation is a governmental agency, but that does not make its property the property of the government nor make the corporation a trustee for the government as to such property. True, also, the United States owns all of the stock of the Spruce Corporation, but that does not make the government the owner of the property of the corporation.

Fitzgerald v. Missouri Pac. R. Co., 45 Fed., 313.

In re Greenleaf, (Ill.) 56 N. E., 295.

The decision of the Federal Supreme Court in the *Sloan case*, holding that the Emergency Fleet Corporation is a separate entity from the United States, conclusively establishes our claim that the Spruce Corporation is a separate entity from the United States. If it is, then property which it holds under deed absolute, without reservation or condition, for which it paid full consideration, is the property of the corporation and not the property of the United States.

Appellees have signally failed to show a trust of any kind. There is no *express trust*, since the written evidence contains no declaration of trust. The deed to the corporation is absolute. Even the parol testimony negatives such a trust. There is no *constructive trust*, since there is no evidence or claim that the corporation acquired title to this property through fraud or breach of duty. There is no *resulting trust*, since the deed recites a consideration paid

by the corporation and the parol evidence shows conclusively that the consideration was actually paid in full by the corporation.

If there is any trust it must have arisen under some settled principle. Yet these are the only classes of trusts known to the law and the evidence here negatives every one of them. The courts cannot create some new species of trust in order to defeat a tax any more than for other purposes.

The further statement in the opinion of the trial court that this property “has not been used in other than for war purposes” is also contrary to the evidence.

Appellant’s Exhibit A, (Record p. 80), is a contract between the Spruce Corporation and Puget Sound Mill & Timber Company, *dated February 14, 1921*, by which the Spruce Corporation for a stipulated consideration paid and to be paid, contracted the use of its railroad to the timber company *for a period of ten years from February 14, 1921*, for transporting three hundred million feet of timber belonging to the timber company.

This is a purely private use, commencing over two years after the armistice and to continue for ten years thereafter, created by contract of the corporation, enforceable under the laws of this State.

Appellant’s Exhibit B, (Record p. 80), is a contract between the Spruce Corporation and C. J.

Erickson, dated *February 21, 1919*, by which for a named consideration the Spruce Corporation sold certain timber to Erickson with the right to use a part of its railroad to transport not only this timber, but also logs purchased by Erickson from others, and for hauling supplies for other private persons, *for a period of one year from February 21, 1919*. In this contract, (sub-section 6), Erickson agreed to transport supplies for the United States Forest Service, and to charge twenty cents per car mile. In such service Erickson was given the right to connect the Spruce Corporation's railroad with the Seattle, Port Angeles & Western Railroad, (sub-section 8), and Erickson was to have the joint use of the Spruce Corporation's telephone system.

Appellant's Exhibit C, (Record p. 80), is a contract between the same parties supplementing the above contract, Exhibit B. It is dated July 30, 1920, extends the contract, Exhibit B, to *January 1, 1921*, and provides for the purchase by Erickson of other timber from the Spruce Corporation and for the use of its railroad in transporting the same until January 1, 1921. In this contract (sub-section 9) the Spruce Corporation agrees to move cars for Erickson for twenty cents per car mile, and to pay him demurrage on certain contingencies.

In the latter part of 1920, the Spruce Corporation purchased from the Clallam Lumber Company some six million feet of timber, paying \$3.00 per thousand, except for the hemlock, which sold for \$2.00 per thousand. (Record pp. 81-82).

All of these contracts evidence purely private dealings and purely private uses of the railroad for periods of from one to ten years, and were made in 1919, 1920 and 1921, the same years for which the taxes in controversy were levied by Clallam County. They were made by a corporation organized under the State law, and created private rights enforceable under the State laws in property protected by the State laws. Moreover, it was admitted by counsel in the trial court when the decree was signed, that since the trial the taxed property had been sold by the Spruce Corporation on a long-time conditional sale contract, the title to remain in the corporation until fully paid for. While this is not in the record the fact will not be denied.

If the Spruce Corporation can deal with this property and enter it in the field of private use, as the contracts in the record show it has, and still have it exempt from State taxes, then we submit that with equal reason the property, even after such conditional sale, will still be exempt from State taxation.

The trial court seems to have proceeded upon the theory that because the United States owned all the stock of this corporation and because such ownership of stock carried with it the election and control of the managing directorate of the corporation, therefore the property of the corporation was the property of the United States. (See Opinion, Record p. 43.)

This is palpable non-sequence. Ownership of

capital stock does not carry ownership of corporate property.

Fitzgerald v. Missouri Pac. R. Co., 45 Fed., 313.

In re Greenleaf, (Ill.) 56 N. E., 295.

The trial court has cited two cases in this connection.

The first of these, *Chicago, Mil. & St. P. Ry. Co. v. Minn. C. & C. Association*, 247 U. S., 490; 62 L. Ed., 1229, was a proceeding before the Railroad & Warehouse Commission of Minnesota, involving switching charges imposed by two railroad systems through the scheme of incorporating a terminal corporation, the two railroads owning all the stock. The court held that this scheme could not be permitted to become the warrant for an increased charge to the shipper without any increase of the service; that for rate making purposes the two railroads should treat all shippers alike whether the shipments were delivered by these railroads over their own tracts or over the tracks of the terminal company. The decision does not touch the power of a sovereign state to tax property situated in the state and belonging to a citizen of the state. It is a freight rate case pure and simple.

The other case, *Cleveland-Cliffs Iron Co. v. Arctic Iron Co.*, 261 Fed., 15, holds that where two common owners of real estate created a holding corporation with equal division of stock and directors be-

tween them, neither party is entitled to obtain an advantage over the other by reason of the corporation form adopted, and that a court of equity may determine the matter with reference only to their individual rights. The question of ownership for taxation was not involved nor mentioned.

It is, of course, true that “courts will not be blinded by form of law,” but will look through corporate form to attain justice or prevent fraud, but there is no fraud or injustice in the tax here involved; it is not claimed that it is unequal with other taxes, or that it is excessive in rate, or that it is based upon an excessive valuation, or that it is inherently unjust for any other reason. It is an equal tax upon the property within the State, protected by the laws of the State just as other like property is protected. There is no inherent injustice in this property bearing its equal proportion of the taxes levied for the protection of all property within the State.

That it was never the intention of Congress that the property vested in this corporation should be the property of the United States, is conclusively shown by the act of Congress authorizing the creation of the corporation. That act in terms contemplated that private persons might acquire and own as much as forty-nine per cent of the capital stock of the corporation. Congress was thus plainly of the opinion that the power to select and control the managing directorate of the corporation which would follow from the ownership of a majority of the capital stock as completely as from the ownership of all, was an

ample guaranty that this property would be used by the corporation for the desired purpose of producing airplane timber, without any declaration of any trust for or retention of any ownership by the United States in the property itself.

Suppose that private persons had acquired (as they might have done under the Act of Congress) 49 per cent, or any other part, of the capital stock of the corporation. Would anyone then have claimed that the property of the corporation was the property of the United States held in trust for the United States, either in whole or in part? Would anyone then have claimed that a part of this property, proportioned to the capital stock held by the United States, exempt from State taxation, and that the balance was not? We apprehend that no one would have seriously advanced either of these views.

Again, as we have pointed out, the very manner in which the operations of this corporation were financed, is conclusive evidence that the ownership of the property was not intended to be retained by the United States nor held in trust for the United States. It was financed and the very property here in question was purchased with the proceeds of the sale to the government of bonds of the corporation, which, so far as they have not been paid, are still held by the government.

These things are not mere matters of corporate form but are matters of substance going to show the intention of Congress in enacting the law authoriz-

ing the formation of this corporation under the laws of the State of Washington.

Let us examine a few of the provisions of that act:

By Section 1 it is left to the director of aircraft to choose the state under the laws of which the corporation was to be formed and no restriction is placed upon his powers in that regard except the total investment shall not exceed \$100,000,000.

By Section 2 that officer is given permission to subscribe on behalf of the United States for the capital stock of the corporation and no restriction is placed upon the nature or extent of the liability so assumed. In the same section he is authorized to buy such evidences of indebtedness as the corporation may offer for sale. He may sell the interest of the United States in the corporation, either all or in part, the only restriction being that the United States shall not be made a minority stockholder.

By Section 3 it is provided that one year after the signing of peace the Director of Aircraft shall, "on behalf of the United States as a stockholder," institute proceedings in the proper State Court to dissolve the corporation and upon such dissolution the corporation "shall be liquidated and the assets distributed in accordance with the laws" of the State. This provision is without any restriction.

These provisions make it too plain for doubt

that the United States assumed the status of, and intended to exercise, and can only exercise in this corporation, the powers and rights of a *stockholder*. If the Federal Government had intended to exercise the sovereign governmental control over this corporation which it exercises over its boards and departments, why the provision that it should always retain a controlling interest in the voting power of the corporation? If the Government had intended to retain the ownership of the property vested in this corporation, why the provision that on its dissolution the assets be distributed by the Court of the State in accordance with the laws of the State? If it ever intended that this corporation should hold its properties merely in trust for the Government, why the *inconsistent* provision that private persons might acquire and own as much as forty-nine per cent of the capital stock?

Section 4 of the Act, touching the personnel of the officers of the corporation, expressly provides that the corporation may employ "civilians in the manner customary in the conduct of ordinary business under corporate organization." This further manifests a plain intent that this corporation shall operate as a mere private corporation under the laws of the State.

Section 5 expressly authorizes the Director of Aircraft to transfer to the corporation any interest of the United States in any contracts necessary for carrying out the corporate business and that he may transfer by appropriate instrument "the title to any

lands, plants, railroads or equipment used in or in connection with the production of aircraft, aircraft equipment or materials therefor.”

If it had been intended that the Government should retain the ownership of such contracts and property and that the corporation should take and hold them as a mere trustee, what easier or more natural than to say so in the act authorizing the transfer? These properties were actually transferred to the corporation by deed absolute, without reservation, condition or declaration of any trust, an instrument of that officer's own selection. Thus in carrying out the legislation which the War Department had doubtless inspired and intrusted to its Director of Aircraft for carrying out, he construed it as contemplating no reservation of ownership in, or trust for, the United States. Such a contemporaneous construction by the officer intrusted by the statute itself with the carrying out of its own provisions is entitled to the greatest weight and will be followed by the courts unless there are the most cogent reasons to the contrary.

United States v. Moore, 95 U. S., 760; 24 L. Ed., 588;

Brown v. United States, 113 U. S., 568; 28 L. Ed., 1079;

Eells v. Ross, (9th Circuit) 64 Fed., 417-420;

Jacobs v. Prichard, 223 U. S., 200-214; 56 L. Ed., 405-409.

The case of *King County, Washington, v. The U. S. Shipping Board Emergency Fleet Corporation*, decided by this Court on September 5, 1922, will no doubt be cited by opposing counsel as decisive of this case. But there are certain considerations which vitally distinguish that case from this.

In the first place, the property there in question was not acquired by the Fleet Corporation with funds coming from the sale of its own bonds or debentures, nor even, as the Court in substance says, from the sale of its capital stock. It was purchased with money directly appropriated by the government for that purpose, the naked title being taken in the name of the Fleet Corporation. This is apparently the controlling factor in that decision. Whereas in this case the property was purchased from the United States by the Spruce Corporation and the government actually took in payment therefor the debenture bonds of the Spruce Corporation in the full value of the property, which bonds, so far as they have not been paid by the corporation, are still held by the government. The government thus became a mere creditor of the corporation, not the owner of the corporate property.

In the second place, the Fleet Corporation was organized under the laws of the District of Columbia, which were enacted by Congress itself. Whereas the Spruce Corporation was organized under the laws of the State of Washington. It may be, as said in the *King County case*, that it is one thing for the government to commit to its agent the control of public

property and authorize it to contract and to sue and be sued in relation thereto, “but quite another thing to permit such property to be encumbered with burdens in the imposition of which neither it nor its agent has any part.” That language may have persuasive force as applied to the Fleet Corporation, but hardly as applied to the Spruce Corporation. The government, by organization of the Spruce Corporation under the laws of the State of Washington, did have just that part in imposing upon the local property of the corporation the same burdens which the laws of that state place upon other like corporate property. By causing the Spruce Corporation to be organized under the laws of the state it made that corporation a creation of the state deriving its franchise and its right to be from the state law and as a corollary subjected its property to the same burdens of taxation as other like corporate property in the state. As said in the case of *Thompson v. Union Pac. R. Co.*, *supras*

“But we are not aware of any case in which the real estate, or other property of a corporation not organized under act of Congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government.”

Further in the same case it is said :

“We do not think ourselves warranted, therefore, in extending the exemption established by the case of *McCulloch v. Maryland*, beyond

its terms. We cannot apply it to the case of a corporation deriving its existence from state law, exercising its franchise under state law, and hold its property within state jurisdiction and under state protection.”

As said in *County of Santa Clara v. So. Pac. R. Co.*, *supra*, after citing the *Thompson case*:

“But we are of the opinion, yielding to the decision cited, that when the instrumentality is the creation of the state—a corporation formed under its laws—and is employed or adopted by the general government for its convenience, although to enlarge its use and render it more available, additional privileges and benefits are conferred by the government upon the corporation, it remains subject to the taxing power of the state, unless Congress declares it to be exempt from such power.”

See also to same effect:

Western Union Tel. Co. v. Attorney Gen.,
125 U. S., 530; 31 Law Ed., 790;

Williams v. Talladega, 226 U. S., 404; 57 L.
Ed., 275.

Congress, when it passed the act authorizing the organization of corporations under state laws, must be presumed to have known of these decisions of the Federal Supreme Court. If it had intended that such corporation should be wholly exempt from state taxation it would have so declared.

In the third place, the provisions of Section 4 of the Act of June 5, 1920, touching the Fleet Corporation, which the court in the *King County case* con-

strued as giving to the government an “unqualified right to dispose of property, without any action on the part of the corporation, and to transfer it to the Shipping Board,” has no counterpart so far as can be found in the legislation touching the Spruce Corporation. There is nothing in the legislation touching the Spruce Corporation evidencing an intention on the part of the government to retain any control over the property vested in that corporation other than what it might exercise as a majority stockholder. Even on a dissolution of the corporation any residue of the property remaining undisposed of by the corporation can pass to the United States only as a stockholder by order of the state court in a proceeding instituted pursuant to state law. This is specifically provided in Section 3 of the Act.

May we respectfully point out to this Court that, insofar as the decision in the case of *King County, Wash., v. U. S. Shipping Board E. F. Corp.* is based upon the theory that the states are without power to levy any tax upon the property of a corporation employed as a governmental agency without permissive legislation of Congress so to do, *it is directly contrary to a line of decisions of the Federal Supreme Court extending back for a century*, including the *McCulloch* case, the *Thompson* case, the *Peniston* case, the *Telegraph* cases and many other cases which we have cited and quoted elsewhere in this brief?

It is said in the *Thompson* case, 9 Wall., 579-592; 19 Law Ed., 792-798:

“No one questions that the power to tax all property, business and persons, within their respective limits, is original in the states and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National Government; but it will be safe to conclude, in general, in reference to persons and state corporations employed in government service, that when Congress has not interposed to protect their property from state taxation, such taxation is not obnoxious to that objection.”

It is said in the *Peniston case*, 18 Wall., 5-50; 21 Law Ed., 787-791:

“That the taxing power of the state is one of its attributes of sovereignty; that it exists independently of the Constitution of the United States, and undervived from that instrument; and that it may be exercised to an unlimited extent upon all property, trades, business and avocations existing or carried on within the territorial boundaries of the State, except so far as it has been surrendered to the Federal Government, either expressly or by necessary implication, are propositions that have often been asserted by this court. And in thus acknowledging the extent of the power to tax belonging to the States, we have declared that it is indispensable to their continued existence. No one ever doubted that before the adoption of the Constitution of the United States, each of the States possessed unlimited power to tax, either directly or indirectly, all persons and property within their jurisdiction, alike by taxes on polls, or duties on internal production, manufacture or use, except so far as such taxation was inconsistent with certain treaties which had been made. And the Constitution contains no express restriction of this power other than a prohibition to lay any duty of tonnage, or any impost, or duty on im-

ports or exports, except that may be absolutely necessary for executing the State's inspection laws."

In your opinion in the *King County case* you quote from the opinion in *Owensboro National Bank v. Owensboro*, 173 U. S., 664-668; 43 L. Ed., 850, as follows:

"It follows then necessarily from these conclusions, that the respective states would be wholly without power to levy any tax, direct or indirect, upon national banks, their property, assets or franchises, were it not for the permissive legislation of Congress."

That this language, if given the meaning accorded to it by this Court, expresses the direct converse of the rule as expressed in the above quotations from the *Thompson* and *Peniston* cases, is self-evident. That the true rule is that expressed in those cases is also self-evident when it is remembered that the powers of the states are *original* powers and the powers of the Federal Government are *granted* powers.

Moreover, the above language quoted from the *Owensboro case* was used in relation to national banks and the governing statute (U. S. Rev. Stat., Sec. 5219) expressly says:

"Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

This language of the statute is in no sense a

permission to tax. Plainly no such permission was necessary. On the contrary, it was a mere disclaimer on the part of Congress of any intention to *prohibit* state taxation of real estate belonging to national banks, which is a very different thing. If express permission were necessary, why any necessity to disclaim an intention to prohibit? The statute thus clearly defining its own meaning it is manifest that if the above quoted language from the *Owensboro case* was intended to apply to real estate it was wholly unnecessary to the decision and hence *obiter dictum*. If, however, it was intended to apply only to the *franchises* of national banks, (and we think a reading of the opinion will show it was so intended) then it is sound, since the exemption of the corporate *franchises*, the right to function and to be, of a governmental agency is necessarily implied as an incident to the granted powers of the Federal Government.

We respectfully submit that the trial court erred in entertaining jurisdiction of this case, and if not in error in that regard, then it erred in not dismissing this case on the merits.

Respectfully submitted,

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WILLIAM B. RITCHIE,
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Solicitors and Attorneys for Appellants.

**United States Circuit Court
of Appeals
For the Ninth Circuit**

CLALLAM COUNTY, WASHINGTON, WIL-
LIAM A. NELSON, Sheriff of Clallam County,
Washington, E. C. STEWART, Treasurer of
Clallam County, Washington, and J. O.
MORSE, Assessor of Clallam County, Wash-
ington

Appellants

vs.

THE UNITED STATES OF AMERICA, and
UNITED STATES SPRUCE PRODUCTION
CORPORATION, a Corporation

Appellees

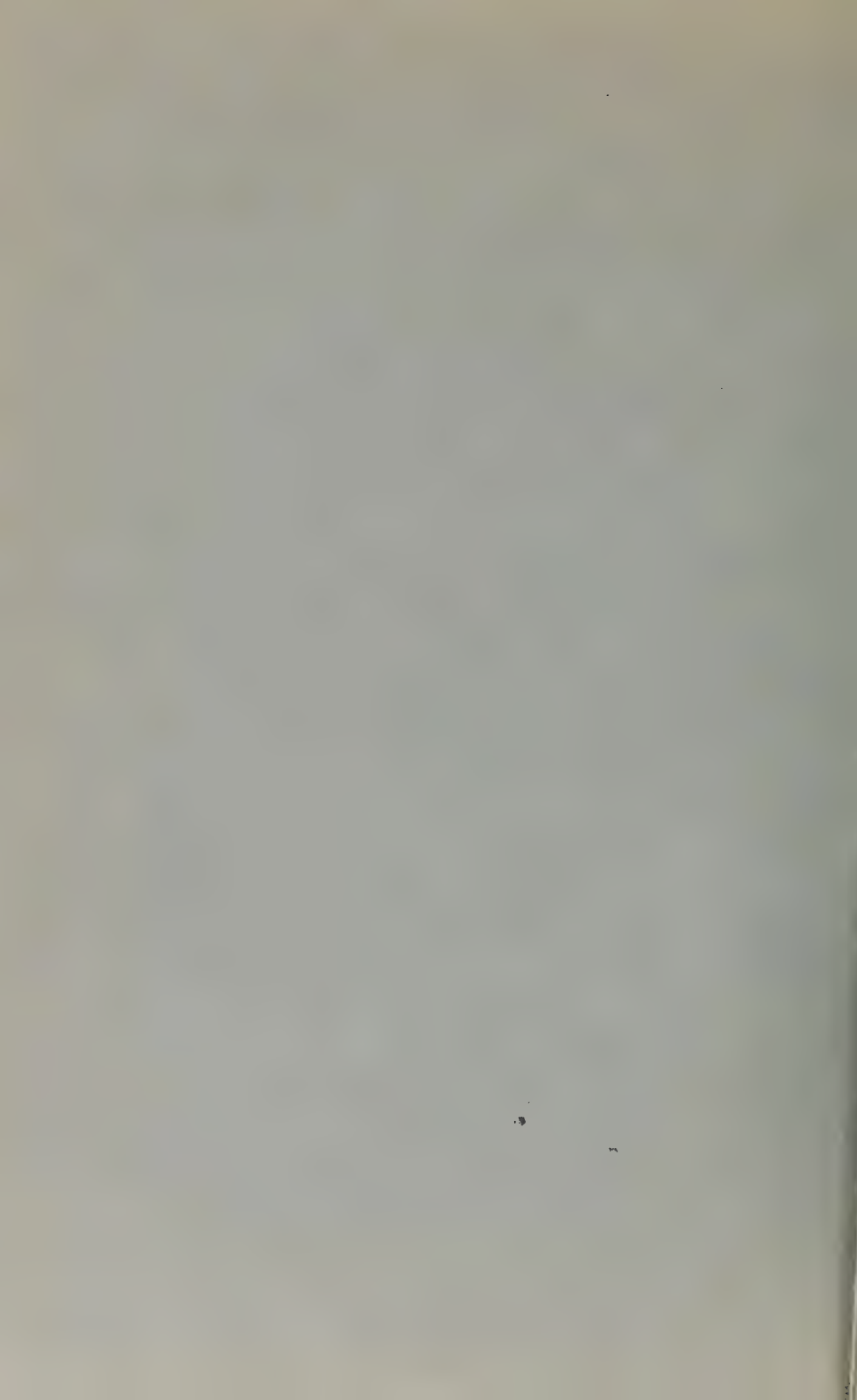
Brief of Appellees

Upon Appeal from the United States District
Court for the Western District of Washington,
Northern Division.

THOMAS P. REVELLE, United States Attorney, and
JOHN A. FRATER, Assistant United States Attorney,
Solicitors for United States of America, Ap-
pellee, Seattle, Washington.

CAREY AND KERR, and OMAR C. SPENCER, Solicitors
for United States Spruce Production Corpora-
tion, Appellee, Portland, Oregon.

FILED



No. 3938

**United States Circuit Court
of Appeals
For the Ninth Circuit**

CLALLAM COUNTY, WASHINGTON, WIL-
LIAM A. NELSON, Sheriff of Clallam County,
Washington, E. C. STEWART, Treasurer of
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MORSE, Assessor of Clallam County, Wash-
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Appellants

vs.

THE UNITED STATES OF AMERICA, and
UNITED STATES SPRUCE PRODUCTION
CORPORATION, a Corporation

Appellees

Brief of Appellees

Upon Appeal from the United States District
Court for the Western District of Washington,
Northern Division.

STATEMENT

This is a suit in equity to remove a cloud from
title and to enjoin tax proceedings in Clallam County,
Washington, for the years 1919 and 1920 and 1921, af-
fecting the railroad called Spruce Production Cor-
poration Railroad No. 1, an uncompleted saw mill at
Port Angeles, and other properties standing in the
name of the plaintiff, United States Spruce Produc-

tion Corporation. After trial upon the merits a decree was rendered in favor of the plaintiffs as prayed in the Complaint. The defendants offered no evidence, relying upon the contention that as a matter of law and upon the facts proved, the District Court was without jurisdiction and that there was no case for the plaintiffs.

Although there are several separate assignments of error, the defendants' points may be restated and summarized as follows:

1. That the Court has no jurisdiction.
2. That the United States is neither a necessary nor a proper party.
3. That the cause of action does not arise under a law or the Constitution of the United States, and the suit is between citizens of the same state.
4. That the Complaint does not state facts sufficient, and that the evidence introduced fails to show a cause of action.

A Summary of the evidence in support of the Complaint is set out in the Record and it will serve no good purpose to repeat it all here. The following facts, however, should be expressly noted:

In May, 1918, the President by virtue of the power conferred upon him by the so-called Overman Act, created the Bureau of Aircraft Production and a Division of Military Aeronautics, the executive officer of which was made the Director of Aircraft Production.

On January 29, 1919, subsequent to the Armistice, these two divisions were placed together, forming the Air Service, as then provided for by Army Regulations, functioning under the Director of Air Service, whose title was subsequently (July 11, 1919) changed to Chief of Air Service by Act of Congress approved on that date. This Air Service, with its powers, functions and duties, as then provided by orders and Army Regulations, continued until June 30, 1920, on which date the National Defense Act, Amended, came into effect and provided for the office of Chief of Air Service. Army Regulation No. 95-5, November 17, 1921, Paragraph E. as prescribed by the Chief of Air Service, is as follows:

“I will in accordance with instructions from the Secretary of War, exercise administrative supervision over the liquidation of the Bureau of Aircraft Production and the United States Spruce Production Corporation.” (Rec. 99-103.)

The Corporation was created in August, 1918, under directions of John D. Ryan, who was Director of Aircraft Production. (Rec. 72-74.) Its operations have been governed by the instructions given to its officers by the War Department.

Lieutenant-Colonel Charles Van Way, President, and Lieutenant-Colonel Arthur L. Fuller, Comptroller and Treasurer of the Corporation, are army officers assigned to duty with the Corporation by

the War Department and they draw their compensation from the Treasury of the United States. Each holds one share of stock and serves as trustee of the Corporation. The third member of the board, who also holds one share, is Charles H. Carey, a civilian. (Rec. 96-98.)

These persons have each signed a waiver in the following form:

“For value received, I hereby assign and set over to the Secretary of War of the United States of America, or to his order for the benefit of the United States of America, any and all moneys, property or dividends which are now due me or which may hereafter become due me or accrue to me from any source whatsoever by reason of any stock in United States Spruce Production Corporation, a Washington corporation. It is understood that the share of stock now standing in my name on the books of the Corporation has been issued to me solely for the purpose of qualifying me as a trustee of said corporation.” (Rec. 84.)

These trustees of the Corporation have endorsed their shares in blank and turned them back to the Secretary. Certificate No. 8 was, upon organization of the Corporation, issued to the Director of Aircraft Production of the United States for 99993 shares. At the time this certificate was issued, the number of trustees as provided by the Articles of Incorporation was seven. Thereafter the number of trustees was reduced by amendment of the Articles to three; whereupon four shares which were held

by the outgoing trustees were issued on certificate No. 17 to the Director of Aircraft Production of the United States. The certificates are in the hands of the Director of Aircraft Production, lodged for safekeeping with the Chief of Finance of the United States. The physical custody of the qualifying shares held by the three trustees is in the Secretary of the United States Spruce Production Corporation. (Rec. 85.)

Thus, all of the shares are owned or controlled by the United States.

The Corporation has never declared dividends. The operations of the Corporation as a whole show loss, and the total liquidation of all the remaining assets will not be equivalent to the total amount expended. (Rec. 92.)

Although the original Articles of Incorporation gave the Corporation very broad powers, these Articles were amended to confine the powers of the Corporation to those prescribed by Act of Congress authorizing the creation of the Corporation. This was done at a special meeting of the board of trustees, October 23, 1918, and a special meeting of the stockholders, November 1, 1918, at which all of the stock was represented in person or by proxy. The change was in conformity with the suggestion of the Advocate General. (Exhibit 10; Rec. 70.)

Prior to the creation of the Corporation the government activities in aircraft production

were carried on by the Production Division, the Bureau of Aircraft Production, and afterwards the Air Service. These activities included producing aeroplane material from the forests of the Northwest. The Division, comprising some 25,000 officers and men, proceeded to take the necessary steps to produce aeroplane lumber. This was accomplished by the building of railroads into proper stands of timber, chiefly in Lincoln County, Oregon and Clallam County, Washington, and the building of saw mills and cut-up plants for the manufacture and remanufacture of the forest products, by creating depots at Vancouver Barracks for the getting together of aeroplane material and also for the resawing and remanufacturing of material at that point. Forces of laborers and soldiers of the United States Army were organized for the purpose of manning and operating these activities. The laborers employed were chiefly soldier labor.

Prior to the creation of the Corporation a government contract was let to Siems-Carey H. S. Kerbaugh Corporation, which managed the activities in behalf of the government, obtaining titles for right of way and building the railroad known as Spruce Production Corporation Railroad No. 1. Part of the titles had not, however, yet been acquired and the railroad was still uncompleted, when the United States Spruce Production Corporation was organized, in August, 1918. The railroad and saw mill had at that time been partly built by these contrac-

tors. The activities after the creation of the Corporation, were taken over by the latter, the properties and rights being assigned to the Corporation, which thereafter carried on the operations until the Armistice was signed, November 11, 1918. The Corporation's activities were wholly directed to the government's program of production of aeroplane lumber. After the signing of the Armistice its activities were directed to the salvage of its assets and converting them into money and otherwise getting ready to dissolve. After the Armistice there were no operations carried on not directly concerned with the winding up and the liquidation of the Corporation's business and its assets. The Corporation actively functioned from about the first of September, through September, October and part of November up to the signing of the Armistice. At the time the Corporation was created the United States conveyed to the Corporation all of its aeroplane properties and activities. (Exhibit 24; Rec. 75-6.)

After Armistice Day work was done for the completion of the Railroad by laying steel and putting in switches and other things incident to the finishing of the Railroad in the course of construction. There was some timber down on the right of way and two contracts were entered into with C. J. Erickson with respect to cleaning up the down timber. (Rec. 87; Exhibits B and C.) These are the Erickson contracts, relied upon by the appellants,

on page 59 of their brief, as showing that the Corporation has been used for other than war purposes.

There was also a contract with the Puget Sound Mills and Timber Company, February, 1921. This contract covered a period of ten years and contemplated transactions affecting the Railroad. It provided for a method whereby the title to this property could be perfected and put in salable condition, and provided for the hauling of logs of the timber company over the Railroad during a period of ten years in exchange for deeds. (Rec. 80; Exhibit A.) A considerable amount of right of way acquired by the Corporation itself was acquired from the Puget Sound Mill and Timber Company, and this contract covered that transaction. The land was necessary as an integral part of the Spruce Production Railroad No. 1, a considerable part of it. (Rec. 86-7.) This transaction is also relied upon by appellants, on page 59 of their brief, as tending to show that the property of the Corporation has been used for other than war purposes.

These were all the contracts relating to hauling products over this road. (Rec. 81.)

The Corporation also entered into a contract with Clallam Lumber Company for the purchase of logs, in the latter part of 1920. The contention was made by the Clallam Lumber Company that an isolated body of timber at the western terminus of this

Spruce Railroad No. 1 was made valueless to them by reason of the ownership of the Railroad. And in the settlement of the various claims, both on the part of the Spruce Production Corporation and the Clallam Lumber Company the price was set upon this timber, which included some 6,000,000 feet, and it was taken over by the Corporation. The Corporation, as a part of the same transaction, secured from the Clallam Lumber Company a release of claims which had been prosecuted by that Company against the Corporation. The price paid the Clallam Timber Company was three dollars per thousand for that timber, and after holding it a few months, the Corporation sold it to Erickson for five dollars for all species other than hemlock, and two dollars for hemlock. (Rec. 81, 82.) This contract resulted in a complete clearance of title for the western terminus of the Railroad, which was part of the lands acquired by the Corporation under its activities, the title to which was not perfected until this contract was entered into. (Rec. 86.) This contract is relied upon by the appellants as showing that the Corporation engaged in business other than for war purposes. (Appellants' Brief, page 59.)

In creating the Corporation, the Director of Aircraft Production directed, and the trustees of the Corporation authorized, the issuance of debentures to the amount of \$25,000,000. These were issued and were delivered to the Registrar, therein named, for the United States. By their provisions they are

to be retired by liquidation of the Corporation, and they bear 5 per cent interest if such interest is earned by the Corporation; they are payable out of the net assets of the Corporation and shall not be payable unless a sum sufficient after liquidation is accumulated to retire them. (Rec. 72-3; Exhibit 15.) Originally it was contemplated that the Allied Governments were to take debentures as well as the United States, but this was not done, as Potter, the acting Director of Aircraft Production, did not accept this suggestion of his subordinate and that plan was never carried out. (Rec. 79.) This is commented upon by appellants at page 57 of their brief, as follows: "Appellees not only failed to show that the United States paid the purchase price when this land was conveyed to the Spruce Corporation, but their evidence shows conclusively that the purchase price was paid by the Corporation to the United States from the proceeds of the sale of the debenture bonds of the Corporation." As we understand the record, no debenture was ever sold, none was issued to any other government, and all that were taken and held by the United States were taken in exchange for cash or its equivalent in the land and other properties conveyed by the Secretary of War to the Corporation. They are all to be repaid out of liquidation by the terms of the debentures, and represent merely a convenient form in handling a transaction between the government and its own agent.

ARGUMENT

This case seems to be controlled by the principle of *King County vs. United States Shipping Board Emergency Fleet Corporation* recently decided by the Court of Appeals, 282 Fed. 950, which holds that property of the United States held by a government corporation is not subject to state tax. Indeed, the Spruce Corporation, which did not engage in commercial business, but was a mere war creation, is even more clearly a pure governmental instrumentality.

As in the cited case, the Corporation held the title of the property taxed, but the entire beneficial interest was in the government, which caused the Corporation to be formed, controlled all of its stock, and furnished all of its capital. (Rec. 92.)

The language used by the Court of Appeals in the case mentioned seems to be applicable here:

“But here, admittedly, the property is not only held by governmental agency but was acquired with public funds, and was to be used exclusively for public purposes. To hold that it lost its public character because the government chose to have the legal title taken in the name of a corporation which it brought into existence and completely controls for its own convenience, and the entire capital stock of which it owns, would be to sacrifice substance to form.”

The opinion of Judge Neterer in the case at bar is set forth in the transcript of record at page 38; and since its rendition an opinion of Judge Wolver-

ton to similar effect has been rendered in *United States Spruce Production Corporation vs. Lincoln County* in the District of Oregon. See also the unreported decision *United States vs. Coghlan*, by Rose, District Judge, in Maryland District, June 29, 1920. These are set out in the appendix to this brief. Compare *Johnson vs. Maryland*, 254 U. S., 51; 41 S. C. 16.

When the government took action it must be deemed to have plenary power and presumed to have all rights necessary to accomplish its purposes in the war.

Dryfoos vs. Edwards, 284 Fed. 596.

If this Corporation is a creature or servant of the United States Government, organized and controlled by federal officers pursuant to Acts of Congress, it seems clear that the United States has a direct interest in the subject matter of the suit and is a proper party plaintiff. If the United States had not joined, it is probable that the appellants would be here urging that the government alone could assert the right of a sovereign to tax exemption.

It surely has the right to make claim that its own property shall not be taken from it by taxation proceedings of a state; and the right to assert in its own courts that, notwithstanding the corporate form, it has an interest as the real owner of the property, and that such property is not subject therefore to state taxation. This principle is settled by the

Debs case, but is illustrated in many other decisions.

In re Debs, 158 U. S. 564; 15 Sup. Ct. 900; 39 L. Ed. 1092.

United States vs. Allen, 179 Fed. 13, at p. 17.

United States vs. Rickert, 188 U. S. 444; 23 S. C. 478; 47 L. Ed. 532.

And see note in Ann. Cases, 1912 D., p. 514.

As to a federal question, the test is whether the suit really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, or an Act of Congress, upon the determination of which the result depends, and which dispute or controversy appears upon the record by a statement in legal and logical form. The inquiry is: Can the suit be decided without deciding a federal question? The case here depends upon the construction of the Acts of Congress involved, and upon the effect of the federal Constitution, and this appears from plaintiffs' own statement of their claim.

What is the effect of the Acts of Congress under which the officers of the United States have created the Corporation, and have caused it to operate; and in view of the provisions of those Acts is the property held by such Corporation property of the United States, to be deemed exempt from taxation under the Constitution? In view of these Acts of Congress is this property, though held by the Corporation in name, nevertheless property belonging

to the United States and exclusively under control of Congress as provided by Article IV, Section 3, subdivision 2, of the Constitution of the United States?

The Constitution of the State of Washington, Section XXVI, expressly exempts from taxation, the following:

- (a) Property belonging to the United States.
- (b) Property hereafter purchased by the United States.
- (c) Property reserved for use of the United States.

And Section 9091, Remington 1915 Codes and Statutes exempts:

“All property whether real or personal belonging exclusively to the United States.”

Under Section 3 of Article IV of the Constitution of the United States, Congress has power to make all needful rules and regulations respecting the territory or other property belonging to the United States.

This is exclusive. “It is familiar law that a State has no power to tax the property of the United States within its limits.” Opinion of Field, J., in

Wisconsin C. R. Co. vs. Price County, 133 U. S. 496, 504.

Property of the United States, therefore, in whatever manner held, is under the control of Con-

gress. Is property any less the property of the United States when carried by it in the name of a state corporation pursuant to Acts of Congress? And does not the very statement of this legal question involve the provision of the federal Constitution quoted and require construction of these Acts of Congress?

We will not lengthen this argument to analyze the authorities upon state taxation quoted in appellants' brief, for this has been rendered unnecessary by the able opinion in the King County case, and the opinion in the District Court in this case and the others of similar character, that have answered and disposed of appellants' citations. It certainly needs nothing more than an examination of the *Thompson* and *Peniston* cases, so freely quoted from and so much relied upon by appellants, to show that what the court was there dealing with was the case of privately owned companies or agencies, and not the case where the corporation was the functionary and creature of the government, holding property and carrying on solely for a governmental object. To tax the property held in the name of such a corporation is effectively to tax the operations of the government; and therein it is plain that the case differs entirely from *McCulloch vs. Maryland*; for the intimation of Chief Justice Marshall that the decision does not apply "to a tax paid by the real property of the bank in common with the

other real property within the state," has no bearing upon this situation. The various railroad and telegraph and other cases cited and relied upon in appellants' extensive brief, distinguishing between a state tax on the operations and on the property of privately owned corporations, seem far from applicable here. The distinction was long ago made clear by Mr. Justice Gray, who showed that the *McCulloch* and *Osborn* cases, in indicating therein that the bank's land or property might be taxable, had reference to real estate of the bank, or bank stock or other property owned by individuals, and that throughout the discussion both by counsel and court in the *McCulloch* case "State taxes upon any property of the United States had been treated as not distinguishable in principle from the particular tax whose validity was in controversy," and that "whether the property of the United States shall be taxed under the laws of a state depends upon the will of its owner, the United States, and no state can tax the property of the United States without their consent."

Van Brocklin vs. Tennessee, 117 U. S. 151, at pp. 156-7 and at p. 175.

Now this property belongs to the United States, although it is in the Corporation. The Corporation itself is but a means to accomplish an end. As said by Mr. Justice Strong in the *Peniston* case: "Exemption of federal agencies from state taxation is

dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or hinder the efficient exercise of their power." A tax upon the property, when the corporation is a privately owned company, would manifestly have no such necessary effect; but clearly a tax upon property when the corporation is solely owned by the government and is operated by it to carry on effectively a foreign war, has such necessary effect. This distinction the appellants fail to see.

If the Corporation's property is taxable in 1919, and 1920 and 1921, it was also taxable when the government was engaged in war, in 1918. It is argued that Congress by authorizing the War Department to use the flexible instrumentality of a state corporate form for its airplane activities thereby intended to release to the state the right to tax the government property accumulated for and used in the war, and so in effect authorized the property to be sold upon tax sales. This is an argument hanging upon a fancied distinction between the government's property and the government's operations under corporate form. There is no such distinction in any proper analysis of the decisions relied upon, for after all this property

belongs to the government though it chooses to carry the title for its own convenience, in the name of a state corporation.

Respectfully,

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THOMAS P. REVELLE,

United States Attorney,

and

JOHN A. FRATER,

*Assistant United States Attorney,
of Counsel.*

APPENDIX**IN THE DISTRICT COURT OF THE UNITED
STATES**

For the District of Oregon

Opinion of Judge Wolverton

**UNITED STATES SPRUCE PRODUCTION
CORPORATION, a Corporation.**

Plaintiff.

vs.

LINCOLN COUNTY, ET AL.

Defendants

WOLVERTON, District Judge:

These are suits, two in number, by the United States Spruce Production Corporation against Lincoln County, Oregon, the sheriff and county assessor, to enjoin the attempted collection of taxes assessed against property standing in the name of plaintiff. The first suit involves taxes for the years 1919 and 1920, and the second for 1921. The plaintiff is a corporation created under the laws of Washington, by the Director of Aircraft Production, pursuant to the Act of Congress of July 9, 1918, amending the Act of April 11, 1918 (U. S. Comp. Stat. 1919, Compact Edition Appendix, p. 1771), for purposes hereinafter indicated. This corporation was duly authorized to transact business in the State of Oregon.

Without reference to particular acts of Congress, it is sufficient to say that the President was authorized, within the limits of funds specifically appropriated, to requisition for the government war materials, including plants, etc., and the Secretary of War was authorized to condemn lands and interests therein for military purposes, including

standing and fallen timber, sawmills, camps, logging roads, rights of way, etc., suitable for the effectual production of lumber and timber supplies, or to purchase the same, or enter into contracts for the use thereof, for like purposes; all such power of the President and Secretary of War being referable to war emergencies.

Accordingly, the United States, under the direction of the President and Secretary of War, undertook the construction of certain logging roads in Washington and Oregon, which was begun by the Signal Corps, Aviation Section of the United States Army, and later continued by the Bureau of Aircraft Production, Spruce Production Division of the United States War Department; these being agencies through which the powers vested in the President and the Secretary of War were exercised, in pursuance of Acts of Congress.

For the purposes indicated, the United States, acting through the Signal Corps, entered into a contract with Warren Spruce Company for the construction of the railroads described, and the acquisition of the rights of way. Likewise, the Signal Corps entered into arrangements with the Port of Toledo, and with other persons and corporations, for the acquisition of mills, terminals and other property for war purposes. All these properties were afterwards transferred to the plaintiff by the Warren Spruce Company or the original owners thereof. Additional rights of way and property were acquired by plaintiff, and additional work was done upon said railroad lines by it. The properties concerned are particularly described in the complaint.

It has been determined that the Shipping Board Emergency Fleet Corporation is not a government organization or agency, possessing the attributes of sovereignty in the sense that it is entitled to immunity from suit in the courts, and that suitors

have their ordinary remedies against it without being relegated to the Court of Claims. *Sloan Shipyards Corporation et al. vs. United States Shipping Board Emergency Fleet Corporation*, and allied cases, advance sheets U. S. Sup. Court, Nos. 308, 376, 526, October term, 1921.

It may be assumed that the United States Spruce Production Corporation occupies like relation to the general government.

Counsel for defendants have filed a very exhaustive and able brief in support of the proposition that the property of the Spruce Production Corporation is not immune from state taxes. Such is the question involved here; not whether it is immune from suit or action, as is the general government.

The cardinal principle upon which the proposition is based is one which has been long established within the purview of the constitution, namely, that a state tax may be lawfully assessed against the property of an agent of the general government, but not against the operations of such agent. This inhibition includes, very naturally, the means to be employed by which such operations are to be made effective for serving the purposes of the general government. To illustrate: By the celebrated case of *McCulloch vs. State of Maryland*, 4 Wheat. (U. S.) 316, it was held that the State of Maryland could not lawfully, in view of the federal Constitution, levy a tax upon the currency of a bank incorporated by Act of Congress, but that it might tax the real property of the bank. The same doctrine was held and applied in *Railroad Company vs. Peniston*, 18 Wall. 5, where a tax upon the railroad was upheld. The cases seem to be uniform in support of the principle, which is concretely stated in *Thomson vs. Union Pacific Railroad*, 9 Wall. 579, 591, in the following language:

“We fully recognize the soundness of the doctrine, that no state has a ‘right to tax the

means employed by the government of the Union for the execution of its powers.' But we think there is a clear distinction between the means employed by the government and the property of the agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means."

With this understanding of the doctrine, it may be questioned whether counsel's application is sound in the present case. The plaintiff corporation, while a private concern, was utilized as a government agency in prosecuting the exigencies of war. The very property which stands in the name of the agent was employed to meet such exigencies. It was acquired for such purposes, and, if denied its use, the agent would have been helpless. It could not have met the demands upon it for conserving war needs. In short, its operations would have been impeded, if not wholly balked and prevented. Thus, it is obvious that, while the holdings described in the complaint in one sense are the property of the plaintiff, they are the vital means by which the government was enabled to carry out its chief purposes in prosecuting the war to a successful termination. The language in the headnote of *Railroad Company vs. Peniston*, *supra*, is apropos and pertinent:

"The exemption of agencies of the federal government from taxation by the states is dependent, not upon the nature of the agents, nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or hinder the efficient exercise of their power."

It would seem that the tax here sought to be annulled would necessarily affect the very means, instruments and agencies by which the general government was endeavoring to carry into effect its power to carry on war; the agency itself, the plaintiff herein, being exclusively employed through the use and application of such means and property in governmental work. *United States vs. Wm. F. Coghlan et al.*—a case in the Federal Court for the District of Maryland, unreported.

But, however this may be, the property here standing in the name of the United States Spruce Production Corporation, concededly a governmental agency, is property acquired by funds appropriated by Congress to be used and employed for governmental uses and purposes, and none other. No private person or corporation, except in the capacity of an agent of the government, has any right, title or interest therein. Property in like status has recently been held by the Circuit Court of Appeals for this Circuit to be immune from local or state taxes. *King County, Wash. vs. United States Ship. Board E. F. Corp.*, 282 Fed. 950. The holding is predicated upon the legal conclusion that no permission has been granted the local authorities, by Congress or otherwise, to tax the property of the plaintiff.

Furthermore, the principle is involved, as alluded to in the case cited, that where property, the title to which is in the principal, is immune from taxes, it is likewise immune if the title is standing in the name of an agent or trustee for such principal. See cases cited in the *King County* case.

The principle, to my mind, is applicable, and conclusive of the controversy. The motion to dismiss will be denied.

IN THE UNITED STATES DISTRICT COURT

District for Maryland

Opinion of Judge Rose

UNITED STATES OF AMERICA

vs.

WM. F. COGHLAN, ET AL.

The County Commissioners for Baltimore County assessed for taxes for the year 1919, certain land standing in the name of the United States Shipping Board Emergency Fleet Corporation, hereinafter called the "Fleet Corporation," and improved by it by the erection thereon of a number of workmen's dwellings, for the use of persons employed in shipbuilding in the vicinity and also certain slips and shipyard shops and appurtenances standing on land belonging to a private Shipbuilding Company.

By the terms of the contract, between the Fleet Corporation and the Shipbuilding Company, the Government constructed or furnished the money for the construction of these slips and buildings. They were to be used by the Shipbuilding Company in building ships for the Government. In certain contingencies, the Shipbuilding Company had the right to buy them at an appraisement. If it did not exercise the privilege, the Government had the right to remove them within a limited time, and if such removal did not take place, they then became the property of the Shipbuilding Company.

The United States filed a Bill in Equity in this Court to annul such assessment and to enjoin the County Commissioners and the Treasurer of Baltimore County from taking any steps to collect the taxes upon such assessment. No request was made for a preliminary injunction, and the case proceeded in ordinary course to final hearing.

It was shown that all the stock of the Fleet Corporation was owned by the Government, and that all it did was done for Government account, and that all the profits which it made would inure to the Government, which would have to stand all the losses. Under such state of facts, it is unnecessary to inquire whether for all purposes the Fleet Corporation is the Government. It suffices that it is a governmental agency, exclusively employed in governmental work and as such, its property is not liable to State taxation.

At the hearing it was stated that since the levy of the tax and the filing of the Bill in this cause, but after some months of the taxing year had expired, the Fleet Corporation sold and conveyed the dwellings and the land upon which they stood, to private interests. Nevertheless, as the tax was assessed for the entire year, and at the time it was assessed, the property was not taxable, the levy must be set aside. In Maryland, so far as I know, there is no authority to impose and collect taxes for a part of the year, and as the result of vacating the original levy the property may escape taxation for the entire year. I do not decide that it will, I will leave such questions to be passed upon by the taxing authorities and the present owners of the land, unembarrassed by anything I may do or say.

The fact that the slips and shops are on land belonging to the Shipbuilding Company, does not so long as the things taxed are the property of an agency of the United States, and are used exclusively for governmental purposes, make them taxable. It is not intended here to intimate any opinion as to what the rights of the State would be if this property were at any time put to other use.

A decree declaring the levy void and enjoining its collection will be passed.

No.

3339

United States
Circuit Court of Appeals
For the Ninth Circuit

CHARLES E. WELLS,

Appellant,

vs.

PATRICK H. BODKIN
and ARABELLA BODKIN,

Appellees.

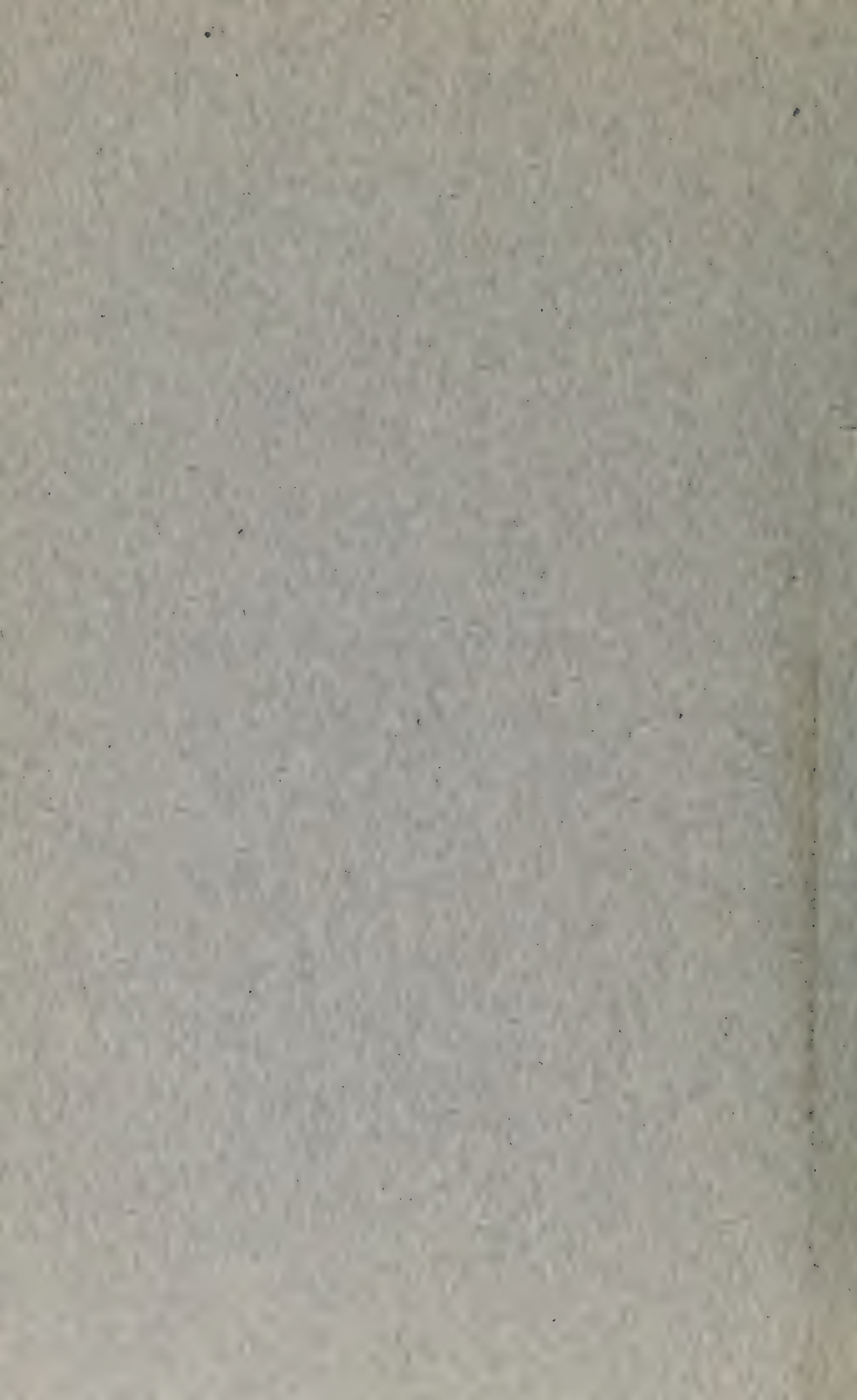
Transcript of Record

Upon Appeal from the United States District Court
for the Southern District of California,
Southern Division.

FILED

OCT 28 1922

F. D. MONCKTON
CLERK



No.

United States
Circuit Court of Appeals
For the Ninth Circuit

CHARLES E. WELLS,

Appellant,

vs.

PATRICK H. BODKIN
and ARABELLA BODKIN,

Appellees.

Transcript of Record

Upon Appeal from the United States District Court
for the Southern District of California,
Southern Division.

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IN THE DISTRICT COURT OF THE UNITED
STATES, SOUTHERN DISTRICT
OF CALIFORNIA.

Southern Division.

CHARLES E. WELLS,)	
)	
Plaintiff,	)	E.—51 EQUITY.
)	
vs.)	
	)	AGREED STATE-
PATRICK H. BODKIN	)	MENT ON APPEAL
	)	UNDER EQUITY
and ARABELLA BOD-	)	RULE NO. 77.
)	
KIN, his wife,)	
)	
Defendants.)	

Come now the respective parties to the above entitled cause and by an agreed statement hereinafter set forth, pursuant to the provisions of Rule 77, present for determination upon appeal from the above entitled Court to the United States Court of Appeals for the Ninth Circuit, the issues hereinafter stated:

This is a suit in equity by Charles E. Wells, plaintiff, against Patrick H. Bodkin and Arabella Bodkin, his wife, defendants and patentees, to have defendants declared trustees holding legal title to certain lands near Blythe in Riverside County, California, to-wit: Tract 78 in Township 7 South, Range 22 East, San Bernardino Meridian, formerly

described as the Northwest quarter of Section 11, Township 7 South, Range 22 East, San Bernardino Meridian, in trust for plaintiff.

The cause was tried upon plaintiff's complaint and defendants' answer and amendment to the answer, which are as follows:

"COMPLAINT IN EQUITY.

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION:

Now comes Charles E. Wells, as a complainant, and respectfully represents and says that he is a citizen of the State of California, residing in the Palo Verde Valley, in Riverside County, and within the Southern Judicial District of California, Southern Division, and brings this his complaint against Patrick H. Bodkin and Arabella Bodkin, his wife, citizens of the State of California, residing in the Palo Verde Valley in Riverside County, within said Southern Judicial District, Southern Division of California, and presents this bill of complaint and says that this is a suit in equity arising under the constitution and the laws of the United States, and that the matter in controversy herein exceeds in value the sum of Three thousand (\$3000.00) Dollars, exclusive of interest and costs; and for cause of complaint against the said Patrick H. Bodkin and Arabella Bodkin, his wife alleges:

I.

That the said plaintiff is, and at all times mentioned herein has been, a citizen of the United States, over the age of twenty-one years, and is now, and has been at all times mentioned herein, qualified under the laws of the United States, to make and perfect a homestead entry upon public lands of the United States, under the land laws of the United States.

II.

That on May 18, 1903, and for a long time prior thereto, the N.W. $\frac{1}{4}$ of Sec. 11, T. 7 S., R. 22 E., S.B.M., situated in the County of Riverside, State of California, was, among other lands in the same neighborhood, open to entry under the land laws of the United States.

III.

That on or about May 18th, 1903, one Jacob H. Geiger duly made his homestead entry in the United States Land Office, at Los Angeles California, on said N. W. $\frac{1}{4}$ of Sec. 11, under the homestead laws of the United States; said Land Office then and at all times mentioned, being the United States Land Office having jurisdiction over said lands as provided by law.

IV.

That on or about the 8th day of September, 1903, the said lands, together with other lands in the neighborhood thereof, were duly withdrawn by order of the Land Department of the United States, under and by virtue of an act of Congress approved June

17th, 1902, and known as, and called the 'Reclamation Act,' from all forms of entry, said withdrawal being what is commonly known as and called, and designated by the Land Department of the United States as, a 'First Form Withdrawal;' and that said lands remained so withdrawn under said 'First Form Withdrawal,' until restored as hereinafter mentioned. That lands so withdrawn under said 'First Form Withdrawal' under said act of June 17th, 1902, cannot, under the terms and provisions of said Act, be entered, selected or located in any manner as long as such lands so remain withdrawn.

V.

That on January 30th, 1908, and while said lands were so withdrawn, one Florence V. Bodkin an unmarried daughter of the defendants herein, filed a contest against the said homestead entry of the said Jacob H. Geiger, on the said lands hereinbefore described, under and by virtue of the laws of the United States and the rules and regulations of the Land Department and subject to the act of Congress of May 14th, 1880, which said contest was recognized by the Land Department of the United States; that the Register and Receiver of the Local Land Office of the United States, at Los Angeles, California, entertained said contest and sustained the same in favor of said Florence V. Bodkin, upon the filing of a relinquishment by the said Jacob H. Geiger of his said entry, and made its report in due form to the Commissioner of the General Land Office, recommending a cancelation of said entry; that on or about

July 1st, 1908, the then Commissioner of the General Land Office sustained the decision of the Register and Receiver of the said Local Land Office, and canceled the said homestead entry of the said Jacob H. Geiger, and directed the said Register and Receiver to advise all parties in interest; that thereafter, to-wit, on July 1st, 1908, the Register and Receiver of the Local Land Office at Los Angeles, California, duly notified said Florence V. Bodkin of the cancelation of said entry; and at the same time notified her that she had been awarded a preference right to enter upon the said N. W. $\frac{1}{4}$ of Sec. 11, T. 7 S., R. 22 E., S.B.M., within thirty days after the said land had been restored to Public entry.

VI.

That, thereafter, by an order duly made by the Secretary of the Interior of the United States, to-wit, on January 10th, 1910, said lands together with other lands in the neighborhood thereof, were restored to public settlement on April 18, 1910, and to public entry on May 18, 1910.

VII.

That on April 18, 1910, plaintiff herein being then and there duly qualified under the land laws of the United States to make settlement and to make homestead entry on open public lands of the United States, made actual settlement on the said N.W. $\frac{1}{4}$ of Sec. 11, T. 7 S., R. 22 E., S.B.M., in Riverside County, California, said lands being a part of the

lands so restored as hereinbefore alleged, with the intention of claiming the same under the homestead laws of the United States; that plaintiff thereby acquired a settler's right under and by virtue of the Act of Congress of May 14, 1880, relating to a settler's right; that he remained thereon as such settler and made his residence thereon, under and by virtue of the laws of the United States, and on May 18, 1910, duly made entry thereon, by filing his homestead application, as such settler, in the United States Land Office, at Los Angeles, California, and paying the fees required by law, and in all respects complied with the laws and rules and regulations of the Land Department, relating to homestead entries, and continued to reside thereon with his family, and make improvements thereon, until dispossessed by said defendants, by a judgment duly made and given in the Superior Court of the State of California, in and for Riverside County, and entered August 6th, 1914.

VIII.

That on May 18, 1910, but subsequent to the settlement and entry of plaintiff, said Florence V. Bodkin made her homestead entry on the same land in the United States Land Office at Los Angeles, California, claiming a preference right so to do, under and by virtue of said alleged preference right theretofore awarded her by the Register and Receiver of the Local Land Office of the United States, at Los Angeles, upon the successful termination of said contest against the entry of said Jacob H. Geiger.

IX.

That on May 18, 1910, all of said applications to enter and all said entries, were duly suspended by the Land Department of the United States, pending the settlement of a contest between the State of California and the United States of America, as to the character and disposition of said lands; that on May 22, 1912, by an order duly made and entered, said lands were again restored to public entry, subject to the entries already made thereon.

X.

That on March 25th, 1912 the said Florence V. Bodkin died, leaving surviving her as her heirs at law, the said Patrick H. Bodkin, her father, and said Arabella Bodkin, her mother, defendants herein.

XI.

That thereafter, on June 3, 1912, without notice or hearing and without evidence, and arbitrarily, the Register and Receiver of the Land Office, at Los Angeles, California, rejected and canceled the homestead entry of plaintiff, and notwithstanding the death of the said Florence V. Bodkin, allowed the homestead entry of said Florence V. Bodkin, on the sole ground that the said Florence V. Bodkin had acquired a preference right under the laws of the United States, by reason of the successful termination of the contest theretofore filed and concluded by her as hereinbefore alleged.

XII.

That thereafter plaintiff duly appealed to the Commissioner of the General Land Office, from such order of rejection, and on or about November 15, 1912, the said Commissioner duly affirmed said action of the Register and Receiver. That plaintiff thereupon duly appealed to the Secretary of the Interior of the United States from the order of said Commissioner, and on said appeal, the action of the Register and Receiver and Commissioner of the General Land Office, was, by said Secretary of the Interior, reversed on May 27th, 1913, and the said entry of Florence V. Bodkin canceled, and the entry of the plaintiff herein allowed for the stated reason that the said Florence V. Bodkin had died on March 25th, 1912, prior to the allowance of her entry. That thereafter a rehearing of said cause was had by said Secretary of the Interior, and on August 29th, 1913, said action of the Register and Receiver and said Commissioner was again reversed, and the said entry of Florence V. Bodkin canceled, and the entry of plaintiff allowed, for the stated reason that said Florence V. Bodkin had died on March 25th, 1912, prior to the allowance of her entry, and that her heirs, namely, Patrick H. Bodkin and Arabella Bodkin, father and mother, respectively, having already used and exhausted their homestead rights under the land laws of the United States, could not succeed to the rights of said Florence V. Bodkin, then deceased. That pursuant to said decision, the said

entry of Florence V. Bodkin was duly canceled on September 18, 1913, and the said entry of plaintiff duly allowed by the Register and Receiver of the Local Land Office on October 14th, 1913.

XIII.

That thereafter upon the application of the defendants herein, as heirs of the said Florence V. Bodkin, deceased, the Officers of the Department of the Interior of the United States, without notice or hearing or evidence and arbitrarily, on January 3, 1914, directed the Register and Receiver of the Local Land Office at Los Angeles, California, that defendant Patrick H. Bodkin, as father of said Florence V. Bodkin be allowed thirty days to elect whether he would relinquish his then homestead entry upon other lands, and make, with his wife, Arabella Bodkin, as co-heir, a homestead entry upon the land hereinbefore described, based upon said application of Florence V. Bodkin, and that in the event of his so doing, the homestead entry of the plaintiff on said lands should be canceled. That pursuant to said order and direction, the Register and Receiver at Los Angeles, California, notified said Patrick H. Bodkin thereof, and the said Patrick H. Bodkin acting thereunder, on March 6, 1914, delivered to the Land Department of the United States, his written relinquishment of a former homestead entry made by him on other lands. That thereupon the officers of the Land Department, acting arbitrarily, and without hearing or notice, and

contrary to law, canceled the homestead entry of plaintiff on May 2nd, 1914, and allowed the said defendant Patrick H. Bodkin, as co-heir with his wife of the said Florence V. Bodkin to make homestead entry upon the said lands, upon the sole ground and for the stated reason that the said Florence V. Bodkin had acquired a preference right under the laws of the United States to enter said lands within thirty days after said lands had been restored to public entry, by reason of the successful termination of the contest of the entry of Jacob H. Geiger, as hereinbefore alleged, and that said preference right descended to defendants herein as her heirs.

XIV.

That thereafter plaintiff adopted, used and exhausted all remedies provided by the laws of the United States, and the rules and regulations of the Land Department of the United States concerning appeals, and the exercise of Supervisory authority, in order to secure his right as a settler, and as a homestead entryman on said lands, under and by virtue of the said settlement and homestead application, but that the officers of the Land Department of the United States refused, and still refuse, to allow him the right he acquired under and by virtue of his settlement on said lands and hereinbefore alleged and his entry thereon under the homestead laws of the United States hereinbefore alleged; that plaintiff was, at the time of said application, and ever

since has been, and still is, duly qualified to make and perfect the right vested in him and granted by law; that by reason of, and through the action and decisions of the Officers of the Land Department of the United States, the said entry of plaintiff has been canceled and denied, and the said entry of the said Florence V. Bodkin has been allowed and approved as hereinbefore alleged, and patent to said lands was, about September, 1919, issued by the President of the United States to the heirs of said Florence V. Bodkin, deceased, to-wit, to the said Patrick H. Bodkin as co-heir with his wife, Arabella Bodkin, and delivered to said defendants, on January 5, 1920, all as the result of said action and decisions of the Officers of the Land Department of the United States and not otherwise.

XV.

And plaintiff further alleges that he is informed and believes, and upon such information and belief alleges, that the Officers of the Land Department of the United States, to-wit, the then Register and Receiver of the Local Land Office at Los Angeles, California, and the then Commissioner of the General Land Office who considered the contest of said Florence V. Bodkin against the former homestead entry of said Jacob H. Geiger, and who, upon cancellation of said entry of Jacob H. Geiger, as aforesaid, decided and advised the parties in interest in said contest particularly said Florence V. Bodkin, that a preference right was thereby awarded to said

Florence V. Bodkin to enter said lands within thirty days after restoration of the same to public entry, acted wrongfully and contrary to the law, by and through a misconstruction of and mistake in the application of the laws of the United States relative to the acquiring of a preference right by reason of such contest, particularly contrary to the express terms of the Act of Congress of May 14, 1880, wherein and whereby a preference right is declared, created, limited and defined.

XVI.

That the officers of the Land Department of the United States acted beyond their jurisdiction, and contrary to law, in arbitrarily, and without notice of hearing or trial, canceling the homestead application of plaintiff herein on May 2nd, 1914, as hereinbefore described and set forth, due to a misconstruction and misapplication of the law relating to the rights vested in this plaintiff by reason of his settlement on the lands described in said application, as hereinbefore alleged, and due to a misapplication and misconstruction and misconception of the law of the United States relating to the preference right created and defined in said act of Congress of May 14, 1880, and as defined and regulated by the rules and regulations of the Secretary of the Interior, particularly those duly issued on January 19, 1909; that the officers of the Land Department of the United States misapplied, misconstrued and misconceived the laws of the United States, relating to the right acquired by said plaintiff in making his settlement

and entry as aforesaid; and misapplied, misconstrued, and misconceived the purpose of the Laws of the United States in denying the same, and canceling the same, by virtue of the alleged preference right of said Florence V. Bodkin awarded her as aforesaid by said officers of the General Land Office, as a result of the successful termination of said contest against the homestead entry of the said Jacob H. Geiger as aforesaid.

XVII.

That the Register and Receiver of the Local Land Office at Los Angeles, and the Commissioner of the General Land Office, and the Secretary of the Interior, in deciding against the right claimed by said plaintiff, under and by virtue of his settlement and homestead entry, as hereinbefore alleged, and in favor of the heirs of the said Florence V. Bodkin, by virtue of the alleged preference right awarded her and recognized by the officers of the General Land Office of the United States, acted contrary to law, under and by reason of a misapprehension, a misconstruction, a misconception, and a disregard of the law of the United States, relating to contests and homestead entries, and settlers rights and preference rights.

XVIII.

That the actions and decisions of the officers of the Land Department as hereinbefore described, in denying plaintiff's right as a settler on the lands hereinbefore described, and the right acquired by

him under the land laws of the United States by reason of said settlement on April 18, 1910, and the filing of his application for homestead entry on May 18, 1910, and his compliance with the laws relating to homestead entries, and in granting the subsequent application to homestead made by the heirs of the said Florence V. Bodkin, on the ground that she had theretofore acquired a preference right under the laws of the United States, by virtue of the successful termination of her contest of the prior homestead entry of said Jacob H. Geiger were without the jurisdiction of the said officers of the said Land Department and were contrary to law, and void, due to a misconstruction, misapplication and misconception of the law on the subject by said officers.

XIX.

That by reason of the misconstruction, misapplication and misconception of said laws, as aforesaid, this plaintiff has been deprived of, and prevented from attaining title to the said lands embraced within his said homestead application, and that the defendants Patrick H. Bodkin, his wife, have been granted the title to the same by a patent from the President of the United States by reason of said actions and decisions of the said officers of the Land Department as aforesaid, and not otherwise.

XX.

That during all the time herein mentioned, and since April 18, 1910, the plaintiff had been ready, able and willing and qualified, under the laws of the

United States, to make and complete and perfect the homestead entry made by him as aforesaid, and that he had in fact complied with all the laws and requirements of the laws of the United States, and all the rules and regulations of the Land Department of the United States, relating to homesteads, so as to entitle plaintiff to a patent for the said lands, excepting the making and filing of final proof of completion and compliance, until he was ejected from said premises by judgment of the Superior Court of the State of California, in and for the County of Riverside, entered August 6th, 1914, as hereinbefore alleged.

XXI.

That the value of the rents, issues and profits of said land since the 6th day of August, 1914, and while plaintiff has been excluded therefrom by the defendants, is the sum of Five Thousand (\$5000.00) Dollars per year.

WHEREFORE, plaintiff prays that a decree be entered herein declaring that the defendants hold the title to the lands hereinbefore described in trust for this plaintiff, and that the defendants be required to make a good and sufficient conveyance of said lands, and the title thereto to this plaintiff, and for the reasonable value of the use of said premises since August 6th, 1914, and for costs of this action, and for such other and further relief that may to the Court seem meet and equitable.

HENRY M. WILLIS

Solicitor for the Plaintiff."

“ A N S W E R .

Come now the above named defendants and for answer to plaintiff's complaint admit, deny and aver as follows:

I

They admit the averments of the unnumbered paragraph and also the averments of the numbered paragraphs I, II III, VI, and X.

II

Answering paragraph IV of plaintiff's bill they admit that the lands in the neighborhood of the lands involved in this suit were duly withdrawn by order of the Land Department of the United States under and by virtue of an Act of Congress approved July 17th, 1902, and known as and called the 'Reclamation Act' from all forms of entry, said withdrawal being what is commonly known as and called and designated by the Land Department of the United States, 'A First Form Withdrawal', and that said lands remained so withdrawn under said 'First Form Withdrawal' until restored as in said bill alleged; but defendants deny that the Northwest Quarter (NW $\frac{1}{4}$) of Section Eleven (11), Township Seven (7) South, Range Twenty-two (22) East, S. B. M., being the lands involved in this suit and covered by the homestead entry of Jacob H. Geiger, were withdrawn by said order; and defendants aver the fact to be that said last described land covered by said Geiger entry was not effected by said withdrawal until the subsequent cancellation of said entry due

to and as a result of the contest of Florence V. Bodkin.

III.

Answering the averments of Paragraph V of plaintiff's bill, defendants admit the filing of a contest by Florence V. Bodkin on January 30th, 1908; but deny that said contest was filed while at or any time when the lands involved in said suit, to-wit, the Northwest Quarter (NW $\frac{1}{4}$) of Section Eleven (11), Township Seven (7) South, Range Twenty-two (22), East, S. B. M., were withdrawn; and on the contrary allege that on January 30th, 1908, when said contest was filed said land was not effected by the said withdrawal order of September 8th, 1903 under said Act of June 17th, 1902; and further answering said paragraph V the defendants aver that the Register issued a notice to Jacob H. Geiger of the Bodkin contest against his entry and that such notice was duly served on said Geiger who thereafter on March 7th, 1908, effected cancellation of his entry by then filing a relinquishment thereof in the office of the Register and Receiver; and the defendants admit that thereafter the Register and Receiver of the local Land Office of the United States at Los Angeles, California, sustained said contest in favor of said Florence V. Bodkin upon the filing of the relinquishment of the said Jacob H. Geiger of his said entry and recommended to the Commissioner of the General Land Office the cancellation of said entry; and de-

fendants admit that on or about July 1st, 1908, the then Commissioner of the General Land Office sustained the decision of the Register and Receiver of the local Land Office and cancelled the homestead entry of the said Jacob H. Geiger, and directed the said Register and Receiver to advise all parties in interest, and thereafter, to-wit, on July 1st, 1908, the Register and Receiver of the local Land Office at Los Angeles, California duly notified said Florence V. Bodkin of the cancellation of said entry of said Geiger and at the same time notified her that she had been awarded a preference right to enter upon the said Northwest Quarter (NW $\frac{1}{4}$) of Section Eleven (11), Township Seven (7) South, Range Twenty-two (22) East, S.B.M., within thirty days after the land had been restored to public entry.

IV

Answering paragraph VII of plaintiff's bill, defendants deny that on April 18th, 1910, plaintiff made actual settlement on the said Northwest Quarter (NW $\frac{1}{4}$) of Section Eleven (11), Township Seven (7) South, Range Twenty-two (22) East, S.B.M., in Riverside County, California; but on the contrary allege that plaintiff for nearly two years prior to April 18th, 1910 had been a trespasser upon and unlawfully in possession of said tract of land; and that on said date, April 18th, 1910, said plaintiff was a trespasser and unlawfully in possession of said land, said lands being covered by the 'First Form Withdrawal' of September 8th, 1903 from and after

the date of the relinquishment of the said entry of the said Jacob H. Geiger on March 7th, 1908. Defendants admit that said lands were a part of the lands restored to entry by order of the Secretary duly made on January 10th, 1910, restoring said lands to public settlement on April 18th, 1910 and to public entry on May 18th, 1910; but defendants deny that plaintiff acquired any right as a settler or otherwise upon said lands by virtue of his said settlement in violation of the laws and regulations of the United States. Defendants admit that on May 18th, 1910, the plaintiff filed in the United States Land Office at Los Angeles, California, an application for homestead entry of the land involved; but deny that plaintiff made 'entry' on said date by filing his homestead application; and defendants deny that plaintiff complied with the laws and rules and regulations of the Land Department relating to homestead entries on said land in that he was a 'sooner' and trespasser in unlawful occupation of said land on the said 18th day of April, 1910. Defendants admit that plaintiff continued to unlawfully reside upon said lands and make improvements thereon until *disposed* by said defendants by judgment duly made and given in the Superior Court of the State of California in and for Riverside County, and entered August 6th, 1914. And defendants specifically deny each and every and all of the other averments and conclusions contained in said paragraph VII of plaintiff's bill not herein expressly admitted.

V.

Answering paragraph VIII of plaintiff's bill the defendants aver that on May 18th, 1910, but not subsequent to any legal or lawful settlement by plaintiff, and not subsequent to any entry of plaintiff, said Florence V. Bodkin filed application to make entry of the land in suit in exercise of her preference right as the successful contestant of the homestead entry of Jacob H. Geiger; but defendants deny that such application so filed by the said Florence V. Bodkin was an entry; and deny that the filing of such application was subsequent to any entry of plaintiff.

VI

Answering paragraph IX of plaintiff's bill, the defendants admit that plaintiff's application and the application of Florence V. Bodkin was suspended, and that the suspension was revoked on or about May 22nd, 1912; but aver that the suspension was ordered on the request of the United States Surveyor General of the State of California for inquiry and investigation of that officer as to the accuracy of other official surveys of certain lands and not because 'of a contest between the State of California and the United States of America' as alleged in plaintiff's bill.

VII

Answering the averments of paragraph XI of plaintiff's bill defendants deny that on June 3rd, 1912 the Register and Receiver 'rejected and can-

celled the homestead entry of plaintiff'; and allege the fact to be that on said date those officers rejected the application of plaintiff who had not then an entry of the land, and on said date duly sent to him a notice of the rejection advising him that the rejection had been ordered 'for the reason that homestead application 010578 was filed for the same lands May 18th, 1910 by Florence V. Bodkin under preference right in Bodkin vs. Geiger,' and said officers forwarded to the said plaintiff with such notice a check numbered 1965 for the amount, to-wit, \$16.00 which he had paid under his application, and for which he had received receipt from the Receiver numbered 363893. Defendants deny that such rejection of said application by said officers was 'without notice or hearing and without evidence and arbitrary'; and aver that such rejection was in every way conformable to law and the rules of practice before the Land Department of the United States and in accordance with due process. Defendants aver the fact to be that entry of the land in the name of Florence V. Bodkin under the application by her was allowed by the Register and Receiver on June 1st, 1912, and not June 3rd, 1912, as alleged in the bill, and was presumably allowed without notice by those officers of the death of said Bodkin.

VIII

Defendants admit the averments as to the findings and conclusions announced in the decisions and judgment rendered by the Commissioner of the Gen-

eral Land Office and the Secretary of the Interior, and as to the dates of cancellation of the Florence V. Bodkin entry and of the allowance of entry by plaintiff respectively as set out in paragraph XII of the bill.

IX

Defendants admit that on January 3, 1914, the Register and Receiver of the Local Land Office at Los Angeles, California were directed by the officers of the Department of the Interior of the United States that defendant Patrick H. Bodkin as father of said Florence V. Bodkin, should be allowed thirty days to elect whether he would relinquish his then homestead entry upon other lands and make with his wife, Arabella Bodkin as co-heir a homestead entry upon the land herein described, based upon said application of Florence V. Bodkin, and that in the event of his so doing the homestead entry of plaintiff on said lands should be cancelled; but defendants deny that such action by the officers of the Department of the Interior were without notice, or without hearing, or evidence, or arbitrarily done; and on the contrary allege the fact to be that such action was taken on two petitions by the defendants to the Secretary of the Interior for exercise of that officer's supervisory authority which petitions were filed September 29th, 1913 and October 27th, 1913, respectively after service of copies thereof on plaintiff by registered mail and after plaintiff had made two answers thereto, one of such answers being filed

October 7th, 1913, and the other being filed December 8th, 1913.

Defendants admit that pursuant to the decision of the Secretary of the Interior after a full hearing, and pursuant to said order and direction as aforesaid, the Register and Receiver at Los Angeles, California, notified said Patrick H. Bodkin thereof, and the said Patrick H. Bodkin acting thereunder, on March 6, 1914, delivered to the Land Department of the United States his written relinquishment for a former homestead entry made by him on other lands. Defendants admit that thereupon the officers of the Land Department cancelled the homestead entry of plaintiff on May 2nd, 1914, and allowed the said defendant, Patrick H. Bodkin with his wife as co-heirs of the said Florence V. Bodkin to make homestead entry upon said lands; but defendants deny that said officers in so doing acted arbitrarily or without hearing, or without notice, or contrary to law; and defendants admit that the said Florence V. Bodkin was allowed to make homestead entry upon the said lands for the reason that she acquired a preference right under the laws of the United States to enter said lands within thirty days after said lands had been restored to public entry by reason of the successful termination of the contest of the entry of Jacob H. Geiger, and that said entry acquired by virtue of said preference right descended to defendants herein as her heirs.

X

Defendants deny that thereafter plaintiff adopted or used or exhausted all or any remedies provided by the laws of the United States and the rules and regulations of the Land Department of the United States concerning appeals, and/or the exercise of supervisory authority in order to secure his or any right as a settler and/or as a homestead entryman on said lands; and on the contrary allege that no steps whatever were taken by plaintiff in the Land Office after the cancellation of the homestead entry of plaintiff on May 2nd, 1914. Defendants admit that by reason of and through the actions and decisions of the officers of the Land Department of the United States, the said entry of plaintiff has been cancelled and the said entry of said Florence V. Bodkin has been allowed and approved, and that patent to said land was on October 23rd 1919, (not September 1919) issued by the President of the United States to the heirs of said Florence V. Bodkin, deceased, to-wit, to the said Patrick H. Bodkin as co-heir with his wife, Arabella Bodkin, and that said patent was delivered to them on January 6th, 1920.

XI

Answering paragraphs XV to XIX inclusive, of plaintiff's bill, defendants allege that they are informed and believe that the averments contained in said paragraphs present mere conclusions of law which need not be answered; but defendants deny that the officers of the Land Department of the

United States acted wrongfully or arbitrarily, or contrary to law, or without notice of hearing or trial when they decided and advised that a preference right was awarded to said Florence V. Bodkin to enter said lands within thirty days after restoration of the same to public entry; and on the contrary allege that such action was after due and legal notice, full hearing and careful consideration and in accordance with law; and defendants deny that the officers of the Land Department of the United States acted beyond their jurisdiction, and/or contrary to law or arbitrarily; or without notice of hearing or trial in cancelling the homestead application of plaintiff on May 2nd. 1914; and on the contrary allege that such cancellation was made after due notice and a full hearing and upon the exercise of supervisory authority by the Secretary of the Interior upon petition duly and regularly filed and served; and that such action by the officers of the Land Department of the United States was not due to any misconstruction, or misapprehension, or misapplication of law relating to the rights of plaintiff, and was not due to any misapplication, or misconstruction, or misconception of the laws of the United States relating to the preference right acquired by the said Act of Congress of May 14th, 1880; and further allege that such action was not due to any misapplication or misconstruction or misconception, or misapprehension of the meaning of the rules and regulations of the Secretary of the

Interior issued January 19th, 1909; and defendants deny that the officers of the Land Department of the United States misapplied or misconstrued or misconceived the purposes of the laws of the United States in cancelling the said entry of said plaintiff and allowing the entry of said Florence V. Bodkin by virtue of her preference right as a result of the successful termination of said contest against the homestead entry of the said Jacob H. Geiger as aforesaid. Further answering paragraph XIX defendants deny that plaintiff has been deprived of, and/or prevented from obtaining title to the said lands embraced within the said homestead application by reason of any misconstruction or misapplication of the laws and regulations of the United States; and deny that these defendants have been granted the title to same by reason of any misconstruction, misapplication, or misconception of said laws.

XII

Answering paragraph XX defendants deny that plaintiff had in fact complied with all the laws and requirements, or laws or requirements of the United States, and all the rules and regulations of the Land Department of the United States relating to homesteads, so as to entitle plaintiff to a patent for said lands; and on the contrary allege that plaintiff in violation of the laws, and in violation of the rules and regulations of the Land Department of the United States entered upon said lands about

two years prior to April 18th, 1910, when said lands were withdrawn from settlement or entry in any form, and that plaintiff could not under the laws, rules and regulations of the United States acquire any right whatsoever by so trespassing upon said lands.

XIII

Answering paragraph XXI defendants deny that the value of the rents, issues and profits of said land since the 6th day of August, 1914, is or has been the sum of Five Thousand (\$5000.00) Dollars per year.

FURTHER ANSWERING SAID COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, THE DEFENDANTS ALLEGE:

I

That upon relinquishment of the Jacob H. Geiger homestead entry on March 7th, 1908, the land covered by said entry thereupon became subject to the exclusive claim and right of the United States under the 'First Form Withdrawal' under the Act of June 17th, 1902, 32 Stat. 388, referred to in the fourth paragraph of plaintiff's bill, and was continually thereafter, and until April 18th, 1910, reserved to the United States and excepted from the body of lands to which claims by settlement or otherwise under the homestead or any of the general public land laws of the United States might or could be initiated or made.

II

That on or about April 18th, 1910, and for a long time prior thereto, and while said land involved in this suit was in a state of withdrawal, said plaintiff was unlawfully occupying and claiming possession thereof; that subsequent to April 18th, 1910, and until removed therefrom by judicial process, the plaintiff prevented occupancy of said land by Florence V. Bodkin through threats of acts of violence against her should she attempt to take and maintain possession of the same, such threats causing her to fear that she would place her life in jeopardy should she maintain possession of said land; that plaintiff's possession of the land at all times, both before and after April 18th, 1910, was with knowledge by him of Florence V. Bodkin's right of preference of entry thereto and his possession of such land at all times subsequent to April 18th, 1910 was with knowledge by him of Florence V. Bodkin's application to make homestead entry thereon which was filed on said date, and plaintiff's possession of said land subsequent to the cancellation of the entry of said Geiger on March 7th, 1908 was with knowledge of the withdrawal of said land prior to April 18th, 1910.

III

That all that was required of Florence V. Bodkin by law or regulations of the Land Department of the United States to duly and timely exercise and effectuate the preference right of entry of the land which she earned by reason of her contest against

the said Jacob H. Geiger entry was to file an application by her to enter the land which she did on May 18th, 1910, that being the date specified in the order of restoration of the land as the first day on which application to enter it could lawfully be received.

IV

That by reason of the suspension of her filing, together with other applications on the request of the United States Surveyor General for the State of California, for inquiry and investigation by that officer as to the accuracy of former official surveys of certain lands, Florence V. Bodkin rested under no legal obligation to enter into possession of the land covered by her application during the period of such suspension, and she did not therefore during that period take and maintain possession as to have done so would have been at the risk of violence against her by plaintiff in accordance with his threats and other acts of his calculated to intimidate, and actually intimidating her, nor was she during said period under any obligation to contest in the courts the matter of plaintiff's unlawful possession.

V

That upon termination of the period of such suspension the Register and Receiver, presumably acting without knowledge of the death of Florence V. Bodkin, allowed an entry of the land in her name and rejected the conflicting application of the plaintiff, whereupon the plaintiff appealed to the

Commissioner of the General Land Office who on November 5th, 1912, affirmed the judgment of the Register and Receiver, the Commissioner saying in his decision in part as follows:

‘. . . right as successful contestant was fully and effectually protected by the regulations effective at the time it accrued (33 L. D. 607) . . . nor could any settlement made by the appellant thereon after the attachment of such right, in the slightest manner affect her privilege (38 L. D. 355) . . . As Miss Bodkin’s application, in all respects regular, filed as aforesaid, in the exercise of her right as a successful contestant, was, in the circumstances stated, the equivalent of an actual entry, it follows that there is no foundation for the appellant’s objection to its allowance.’

V.

That the plaintiff appealed from the decision of said Commissioner to the Secretary of the Interior and the latter officer on May 27th, 1913, reversed the concurring judgments of the Register and Receiver and Commissioner in a decision in which he said among other things:

‘It appears from the record that Bodkin died on March 25, 1912. It will thus be seen that she died prior to the allowance of her entry.

No such right is acquired by mere application to make homestead entry as will, in the event of the death of the applicant, descend to his

widow or heirs or that can be disposed of by will; nor is there any authority of law for the allowance of entry, in such case, in the name of a deceased applicant. (Garvey V. Tuiska, 41 L. D. 510.)

Bodkin's entry is, accordingly, canceled and the application of Wells will be allowed in the event that he makes proper showing of present qualification to make homestead entry for the tract.'

That the heirs of Florence V. Bodkin duly filed a motion for rehearing of the said decision of the Secretary of the Interior which motion was denied by decision of that officer rendered August 29, 1913, in which he said, among other things:

'The reason assigned for the holding in the case of Garvey V. Tuiska (*supra*), that Congress has made no provision for succession and descent with reference to a mere application to enter, does not therefore apply in the case of an application to enter filed under a contestant's preference right, but in such cases, by the act of July 25, 1892 (27 Stat. 270) (*supra*), the contestants heirs have the right to perfect such application filed by him pending at his death and to make entry thereon.

In this case, however, it appears that Bodkin's heirs are her father and mother, equally, and that her father has made homestead entry in his own right, which precludes him and his

wife as heirs of this daughter from perfecting the application filed by her under her preference right as successful contestant against the prior entry for the land and erroneously allowed after her death; as heirs making homestead entry under a preference right initiated in their ancestor whom they succeed under said act of July 26th, 1892, must comply with all provisions of the homestead law, and reside upon, improve and cultivate the land the same as would their ancestor himself have been required to do had he made such entry. *Becker v Bjerke*. (36 L.D. 26); *Heirs of Robert M. Averett*, (40 L.D. 608) (*supra*).

Bodkin's entry must therefore, be canceled for the reasons above stated; and while Wells application when filed was properly subject to rejection because of Bodkin's superior right of entry, and his settlement prior to her death was wholly a trespass upon her rights, no legal reason now exists for rejecting his application, which was only suspended until its rejection June 3, 1912, and same should be allowed.'

VII

That thereafter the heirs of Florence V. Bodkin petitioned the Secretary of the Interior to exercise his supervisory authority in the case and to review his judgments on the appeal and under the motion for rehearing. That acting on such petition and after notice thereof to plaintiff and answers thereto

by him, the Secretary of the Interior by his decision of January 3, 1914, held as follows:

‘He (Wells) is a party to the record but not in interest from any legal standpoint, and his appearance in the case is without prejudice to the right of Bodkin’s heirs to perfect her application for entry. If guilty of having, by threats, intimidation and violence, prevented Bodkin from making settlement on the lands to which she had preference right of entry, and enjoying the benefit of such right from and after April 18, 1910, the date when said lands were restored to settlement and when she is alleged to have attempted to have been thus prevented by him from settlement, he should not be allowed to profit by his wrong if her heirs now desire to perfect her application by making entry thereon, which they have the technical right to do independently of any such threats, intimidations and violence, and notwithstanding the homestead entry made by her father, one of said heirs. He may not perfect both homestead entries, as he could not comply with law as to both, but he may elect which he will perfect, and the fact that he has already made homestead entry in his own right does not now preclude his election to make and perfect homestead entry, as co-heir with his wife, based upon the application of his daughter, notwithstanding present entry or Wells appearance in the case.

Thirty days from notice of this decision is therefore hereby allowed the father of said Florence V. Bodkin, appearing herein as one of her heirs, to elect whether he will relinquish his present homestead entry and make, with his wife as co-heir, homestead entry based upon said Florence V. Bodkin's application; at the expiration of which period further adjudication will be had.'

VIII

That upon the decision of the Secretary of the Interior of January 3, 1914, becoming final the defendant, Patrick H. Bodkin, on March 6, 1914, relinquished the homestead entry made in his individual right and tendered an application by himself and his wife, Arabella Bodkin, the other defendant here, as the sole heirs of Florence V. Bodkin, deceased, to make homestead entry of the land in suit; that thereafter the entry of the plaintiff was canceled; that thereafter the defendants made entry as the heirs of Florence V. Bodkin, deceased, resided upon and cultivated the land in suit for the period, in the manner and to the extent required of them by the homestead laws and after proof accordingly and on October 23, 1919 the land in suit was patented to them by the United States of America under such entry by them as such heirs.

AS A FURTHER AND SEPARATE DEFENSE DEFENDANTS ALLEGE:

That they and each of them have together resided, lived upon and since the 6th day of August, 1914,

held the actual, open, notorious, exclusive, peaceable and adverse possession of the Northwest Quarter (NW $\frac{1}{4}$) of Section Eleven (11), Township Seven (7) South, Range Twenty-two (22) East, S.B.M., in Riverside County, California, and from said date have claimed and held the actual, open, notorious, exclusive, peaceable and adverse possession of said premises *of said premises* and every part thereof, claiming the same as their own and adversely to the plaintiff, and since said 6th day of August, 1914 have paid all of the taxes levied and assessed against said premises by the State of California and the County of Riverside, and that said defendants have thereby acquired as against said plaintiff a title by prescription to said premises.

WHEREFORE, defendants pray that plaintiff take nothing by his bill and that defendants recover their costs herein expended, and that they have such other and further relief as to the Court may seem just in the premises.

DUKE STONE

DAN V. NOLAND

PATRICH. H. LAUGHRAN,
Mills Bldg., Washington, D. C.
of Counsel."

"No. E-51

AMENDMENT TO ANSWER.

By leave of court first had and obtained, come now the defendants and file this amendment to their answer heretofore filed herein.

I.

In lieu of the last separate defense set forth in said answer heretofore filed, defendants allege the following: That they and each of them have resided, lived upon, and since the 6th day of August, 1914, have continuously and uninterruptedly held the actual, open, notorious, exclusive, peaceable, adverse possession of the northwest quarter of Section 11, T. 7 S., R. 22 East, S. B. M., in the county of Riverside, State of California, and from said date said possession has been by actual occupation, open and notorious and not clandestine; that said possession has been hostile to plaintiff's claim of title; that defendants' possession has been held under a claim of title exclusive of any other right, as their own; that defendants' possession has been continuous and uninterrupted for a period of five (5) years next before the commencement of this action; and since said 6th day of August, 1914, defendants have paid all of the taxes levied and assessed against said premises by the State of California and County of Riverside, and that said defendants have acquired as against said plaintiff a title by prescription to said premises.

As a further and separate defense, defendants allege that plaintiff's alleged cause of action is barred by the provisions of the Code of Civil Procedure contained in sections 318-319-321-322, 323-324 and 325.

DUKE STONE &

DAN V. NOLAND

Attorneys for Defendants."

The following facts are agreed to, and the following proceedings taken:

1. The following stipulation of facts was made by counsel for the respective parties, to-wit:

“It is stipulated by plaintiff and defendants, by their counsel, that the plaintiff Charles E. Wells is a resident of the Palo Verde Valley in Riverside County, within this Southern Judicial District; that this is a suit in equity arising under the statutes of the United States and the matter in controversy herein exceeds in value the sum of \$3,000, exclusive of interest and costs.

It is further stipulated that the plaintiff is and at all times mentioned herein has been a citizen of the United States over the age of 21 years, and is now and has been at all times mentioned herein qualified under the laws of the United States to make and perfect a homestead entry upon public lands of the United States under the land laws of the United States; that on May 18, 1903, and for a long time prior thereto, the northwest quarter of Section 11, Township 7 South, Range 22 East, S.B.M., situated in the County of Riverside, State of California, was, among other lands in the same neighborhood, open to entry under the land laws of the United States. That on July 17, 1902, the following letter or order was issued and promulgated by the Land Office:

‘Washington, D.C., July 17, 1902.

‘Subject: Withdrawal and Suspension
from Entry.

‘Register and Receiver,

‘U. S. Land Office,

‘Los Angeles, California.

‘Sirs:

‘The Honorable Secretary of the Interior, by letter dated June 27, 1902, and his order indorsed thereon dated July 2, 1902, has directed the temporary withdrawal from settlement or other disposition under the public land laws, until relieved from suspension, of certain townships, some of which lie within your district. You are therefore directed to withdraw from disposal the following townships so far as surveyed and on file;

Then follow descriptions of a number of townships, among which appears the following:

‘Townships 1 to 16 south, inclusive, Range 22 east, S.B.M.”

Within which is included the quarter-section herein involved. The letter concludes as follows:

‘Please acknowledge receipt.

‘Signed) Binger Herrmann, Commissioner.’

MR. NOLAND: Before leaving that letter, should it not also at this point be stipulated that this is what is known as a second form withdrawal?

MR. WILLIS: It is stipulated that the letter just read into evidence is what is understood to be and commonly called a second-form withdrawal order under the Reclamation Act.

It is further stipulated that on May 18, 1903, one Jacob H. Geiger filed in the United States Land Office at Los Angeles his homestead application, subject to the Reclamation Act, to enter the Northwest Quarter of Section 11, Township 7 South, Range 22 East, S.B.M., in due and proper form, and paid the fees therefor. That on September 12, 1903, the Commissioner of the General Land Office issued the following order or letter—which it is stipulated between counsel is what is commonly called a first-form withdrawal order—the letter being in the words and figures following:

‘Washington, D.C., September 12, 1903.

‘Subject: Withdrawal for Irrigation.

‘Register and Receiver,

‘Los Angeles, California.

‘Sirs:

“Following my telegram of the 10th instant withdrawing lands in your district for irrigation purposes by whole townships, you are now advised that by Departmental direction of the 8th instant you will temporarily withdraw the following lands, surveyed and unsurveyed, from all forms of disposal whatever under the first form of withdrawal authorized by Section 3 of the Act of June 17, 1902, 32 Stat. 386.’

Then follows in the letter a long list of townships and sections, among which appears the following:

‘Section 11, Township 7 South, Range 22 East, S.B.M.’

Being the section including the quarter-section herein involved. The letter concludes as follows:

‘Please acknowledge receipt hereof. Very respectfully,

(Signed) ‘W. A. Richards,
Commissioner.’

It is further stipulated that on January 30, 1908, one Florence V. Bodkin filed in the United States Land Office at Los Angeles her contest affidavit contesting the homestead entry of Jacob H. Geiger on the Northwest Quarter of Section 11, Township 7 South, Range 22 East; that notices of contest were on the same day issued and the hearing thereof set for April 3, 1908; that on March 13, 1908, such contest was withdrawn by the contestant, and on the same day a relinquishment of the entry executed by Jacob H. Geiger was filed by contestant; that at the same time contestant paid the \$1.00 cancellation fee, and a notice of preference right of thirty days given after the land was opened for entry.

It is further stipulated that by an order duly made by the Secretary of the Interior on January 10, 1910, the lands described in this complaint, together with other lands in the neighborhood thereof, were restored to public settlement on April 18, 1910, and to public entry on May 18, 1910.

It is further stipulated that on May 18, 1910, all applications to enter lands described in the complaint and all of said entries were duly suspended by the Land Department of the United States and that on May 22, 1912, by an order duly made and entered, said lands were restored to public entry, subject to the entries already made.

It is further stipulated that on March 25, 1912, the said Florence V. Bodkin died leaving surviving her, as her heirs at law, the said Patrick H. Bodkin, her father, and the said Arabella Bodkin, her mother, defendants herein.

It is further stipulated that the Northwest Quarter of Section 11, Township 7 South, Range 22 East, being the quarter-section described in the complaint herein, was, by a re-survey thereof, changed to be described as tract 78 in Township 7 South, Range 22 East, S.B.M., California, containing 160 acres, according to the official plat of the survey of said land returned to the General Land Office by the Surveyor General; and that by such description that quarter-section was patented to the heirs of Florence V. Bodkin by patent No. 71471 dated October 23, 1919, delivered on January 6th, 1920, and recorded on January 19, 1920, in Book 8 of Patents, page 58, of the Records of Riverside County."

2. That on July 1, 1908, the following notice was issued and delivered to Florence V. Bodkin by the Register of the United States Land Office at Los Angeles, California, to-wit:

“DEPARTMENT OF THE INTERIOR

United States Land Office,

Los Angeles, California.

Jul 1 1908.

Miss Florence V. Bodkin,

121 N. Main Street,

Los Angeles, Cal.

Madam: In the case of Florence V. Bodkin vs Jacob L. Geiger, involving Homestead entry No. 10239, made May 18, 1903, for the NW 1/4, sec. 11, T. 7 S. R. 22 E. S.B.M. You filed affidavit of contest Jany. 30th, 1908 and due service was had on Contestee and judgment had in your favor on the 13th of March, 1908 and the relinquishment by the said entry man was filed by you, having been procured through your contest.

Said land was withdrawn from entry pursuant to Commissioner's letter 'E' of Sept. 12th, 1903 and so remain withdrawn from entry.

You are notified that you have a preference right of entry for thirty days after the said land shall be restored to entry, and that during that time no one has any right to take possession of said land, or endeavor to settle upon or reclaim it adverse to you.

Very respectfully,

(Sgd.) Frank C. Prescott, Register.”

3. That on May 18, 1910, at 9 o'clock A.M. Charles E. Wells filed in the United States Land Office at Los Angeles, California, his application

No. 010591, to enter, under Section 2289 Revised Statutes of the United States, the N. W. $\frac{1}{4}$, Section 11, Township 7 South, Range 22 East, S. B. Meridian, within the Los Angeles, California land district, and paid the required fees of \$16.00, said application being in the usual and proper form for homestead entry, and containing at the end thereof the following words, to-wit:

“That I have made actual residence on said land and am now an actual settler thereon.”

4. That on May 18, 1910, at 9 o'clock A.M. Florence V. Bodkin, filed in the same land office her application, No. 010578, to enter, under Section 2289, Revised Statutes of the United States, the N. W. $\frac{1}{4}$, Section 11, Township 7 South, Range 22 East, S. B. Meridian, within the Los Angeles, California land district, and paid the required fees of \$16.00, said application being in the usual and proper form for homestead entry.

5. Plaintiff introduced in evidence the portion of the Register of Homesteads kept in the local land office, containing entries relating to the homestead entry of Charles E. Wells, which entries were and are as follows:

“KIND: Hd. 2nd Act of June 5, 1900. Serial No. 010591

NAME

Charles E. Wells.

ADDRESS

Blythe, Riverside Co. Cal.

DESCRIPTION OF LAND.

SECTION. TOWNSHIP. RANGE. AREA.				
N W $\frac{1}{4}$	11	7S	22E	160
DATE		NOTATIONS.		
1910				
May 18	Application filed. Suspended pending hearing as to character of land. U. S. Surv. Gen. letters, 4/15 and 5/13/10			
May 18	Receipt No 363893 Fees \$16.			
1912				
May 24	Application rejected because of Hd. Appln. 010578 of Florence V. Bodkin for same lands, filed 5/18/10 under preference right in case Bodkin vs Geiger.			
June 3	Notice of rejection to applicant together with check 1965 for \$16.00			
" 12	Service of rejection accepted. Reg.			
1912				
July 6	Appeal filed-check 1965 returned.			
July 31	Answer of Bodkin filed - as heir of Florence V. Bodkin-re Charles E. Wells, H. E.			
1912				
Nov 20	"H" 11/15/12 affirms rejection.			
Dec 2	Service of H 11/15/12 accepted. Reg. Mail			
Dec 31	Claimant files appeal from decision of G.L.O. also evidence of service on Florence V. Bodkin.			
1913				
Jan 9	Appeal by claimant transmitted to G.L.O.			

- Sept 23 H of 9/18/13 transmits Appln. of Wells for allowance allow Wells 30 days to perfect his Appln. and cancels the entry of Bodkin.
- Sept 29 Notice of H 9/18/13 sent to claimant: Reg. Mail.
- Oct 9 Service of H. 9/18/13 accepted. Reg. Mail.
" 14 Allowed by H 9/18/13.
- Jan 30 1914. H of 1/26/14 allows Bodkin's father to elect whether he will retain his own Hd. or relinquish it and file on one as heir of Florence Bodkin. See Dept'l decision.
- Mar 18 Evidence of Service to G.L.O. with report of allowance of H.E. 022872.
- May 9 H of 5/2/14 finally cancels the entry and closes case to 010578.
- May 15 Notice of above to Wells, Ord. Mail."

6. Plaintiff introduced in evidence the portion of the Register of Homesteads kept in the local land office containing entries relating to the homestead entry of Florence V. Bodkin, which entries were and are as follows:

"KIND: Hd. SERIAL No. 010578

NAME

Florence Verne Bodkin.

ADDRESS.

Neighbours, Riverside Co. Cal.

DESCRIPTION OF LAND

N W $\frac{1}{4}$

SECTION. TOWNSHIP. RANGE. AREA.

11

7S

22E

160

DATE.

NOTATIONS.

1910

May 18 Application filed. Suspended pending hearing as to character of land. U. S. Surv. Gen. letters 4/16 and 5/13/10.

" 18 Receipt No. 363880, Fees \$16.

1912

May 22 Restored telegram May 22, 1912.

June 1 Entry allowed. Notice of Election Mailed June 20/12.

Dec 3 Affidavit filed by P.H.Bodkin, Neighbours, Cal. that he entered on this entry of his deceased daughter and cleared about 2 acres on Nov. 29, 1912.

1913

Jan 9 Appeal filed by Charles E. Wells (010591) Transmitted to G.L.O.

Sep 23 "H" of 9/18/13 transmits appln. of Wells for allowance and finally rejects this entry.

1914

Jan 30 H of 1/26/14 transmits dept'l decision allowing Florence V. Bodkin's father to elect whether he will retain his own homestead or relinquish and file on a homestead with his wife as co-heir on the appln. of Florence V. Bodkin.

Feb 6 Notice of H. 1/26/14 sent to claimant:
Reg. Mail.
" 12 Service of H 1/26/14 accepted. Reg. Mail
Mar 18 Evidence of service Trans. G.L.O. with re-
port of filing entry by Bodkin.
Mar 9 H of 4/2/14 finally closed the case and can-
cels 010591."

7. That on June 3, 1912, the Register and Receiver of the Los Angeles land office gave the following notice of rejection to Charles E. Wells, to-wit:

DEPARTMENT OF THE INTERIOR

"CRN United States Land Office 010591
Los Angeles, California,
June 3, 1912.

NOTICE OF REJECTION
of Suspension.

Charles E. Wells,
Blythe, California.

Sir:

In reference to your application to make Homestead Entry No. 010591, filed May 18, 1910, for the NW 1/4, Section 11, Township 7 S., Range 22 E, S.B. Meridian, you are advised that on May 24, 1912, the Register and Receiver of this office rejected the same for the reason that Homestead Application 010578 was filed for same lands May 18, 1910, by Florence V. Bodkin, under preference right in Bodkin v. Geiger.

Check No. 1965, for \$16.00, repayment account of Receipt No. 363893, inclosed herewith.

You are allowed thirty days from notice hereof in which to appeal from this decision to the Commissioner of the General Land Office; and upon your failure to take such action within the time specified, the case will be closed without further notice to you from this office. If an appeal is taken herefrom it must be filed in this office.

Please return this letter, in case you take any action or desire further information on the subject.

Respectfully,

(Sgd.) Frank Buren.

Register.

(Sgd.) O. R. W. Robinson,

Receiver."

8. That said Charles E. Wells appealed in due time and form from said decision of the Register and Receiver to the Commissioner of the General Land Office at Washington, D. C., and on November 15, 1912, the Commissioner's decision thereon was rendered in the following language:

"Los Angeles 010578 & 010591. "H" E.E.Y.

November 15, 1912.

Charles E. Wells)

) Affirming

v.) Wells' application rejected

) Subject to appeal.

Florence V. Bodkin.)

Register and Receiver,
Los Angeles, California,

Gentlemen:

Charles E. Wells has appealed from your rejection of his homestead application 010591, filed May 18, 1910, for the NW 1/4 Sec. 11, T. 7 S., R. 22 E., S.B.M., under the facts hereinafter recited.

The land involved was withdrawn under a first-form withdrawal September 8, 1903, and retained that status until on January 10, 1910, it was restored to settlement on April 18, and to entry May 18, 1910, on which last named date, on request of the Surveyor General, it was suspended pending an investigation as to its character, from which suspension it was relieved on May 22, 1912.

On May 18, 1903, one J. L. Geiger Made H. E. No. 10039 for said land, against which on January 30, 1908, Miss Florence V. Bodkin filed affidavit of contest, upon which notice was issued and served, after which the entryman, on March 7, 1908, relinquished, whereupon, on July 1, 1908, the contestant was advised of such reclamation withdrawal, and that her preferential right under her contest would be held suspended awaiting restoration of the tract to entry.

On May 18, 1910, Miss Bodkin filed homestead application No. 010578 for the described land, which was held pending the result of the investigation by the surveyor general, and on the same date Charles

E. Wells filed his homestead application No. 010591, for the same tract, alleging that he had established his actual residence thereon, which was also suspended.

The land having been relieved from such suspension, you on June 1, 1912, allowed the application by Bodkin, and on June 3, rejected that of Wells for conflict therewith.

The appellant contends that you were in error in holding that Bodkin acquired any right under her contest, in not ordering a hearing, and in not holding that whatever right she might have had under such contest was terminated by the regulations of January 19, 1909 (37 L.D. 365).

In also appears that the applicant Bodkin died March 25, 1912, leaving two heirs, who have appeared in the case, and upon which it is also insisted by the appellant that you were in error in allowing her application.

Miss Bodkin's right as a successful contestant was fully and effectually protected by the regulations effective at the time it accrued (33 L.D., 607), and under which she was entitled to thirty days from notification in which to make application for the land, after its restoration, nor could any settlement made by the appellant thereon, after the attachment of such right, in the slightest manner affect her privilege. (38 L.D. 335).

As Miss Bodkin's application, in all respects regular, filed as aforesaid, in the exercise of her right as a successful contestant, was, in the circum-

stances stated, the equivalent of an actual entry, it follows that there is no foundation for the appellant's objection to its allowance.

Your action is affirmed subject to the usual right of appeal, of which you will notify the appellant and in due time report.

Very respectfully,

(Sgd.) S. V. Proudfit.

Assistant Commissioner.

Board of Law Review

(Sgd.) John P. McDowell."

9. That said Charles E. Wells appealed in due time and form from said decision of the Commissioner to the Secretary of the Interior, and on May 27, 1913, the Secretary's decision thereon was rendered in the following language:

"OFFICIAL COPY

DEPARTMENT OF THE INTERIOR

Washington.

D-23027

May 27 1913.

Charles E. Wells	)	"H"
	)	Los Angeles 010578, 010591.
v.	)	Homestead application
	)	rejected,
Florence V. Bodkin.	)	Reversed.

APPEAL FROM THE GENERAL LAND
OFFICE.

Charles E. Wells has appealed from the decision of the Commissioner of the General Land Office,

dated November 15, 1912, rejecting his homestead application, filed on May 18, 1910, for the NW 1/4. Sec. 11, T. 7 S., R. 22 E., S.B.M., Los Angeles, California, land district, because of conflict with the homestead entry of Florence V. Bodkin, allowed on June 1, 1912, upon her application filed on May 18, 1910.

It appears from the record that Bodkin died on March 25, 1912. It will thus be seen that she died prior to the allowance of her entry.

‘No such right is acquired by mere application to make homestead entry as will, in the event of the death of the applicant, descend to his widow or heirs or that can be disposed of by will; nor is there any authority of law for the allowance of entry, in such case, in the name of a deceased applicant.’

(*Garvey v. Tuiska*, 41 L.D., 510.)

Bodkin’s entry is, accordingly, canceled and the application of Wells will be allowed in the event that he makes proper showing of present qualification to make homestead entry for the tract.

(Signature illegible)

Assistant Secretary.”

10. That the defendants, Patrick H. Bodkin and Arabella Bodkin, his wife, as heirs of said Florence V. Bodkin, duly filed and made a motion for rehearing on the decision of the Secretary of May 27, 1913, and on August 29, 1913, the Secretary rendered his decision, denying said motion, in the following language:

“OFFICIAL COPY
Department of the Interior
Washington

D-23027

August 29, 1913.

Charles E. Wells,)	
	)	“H”
v.	)	Los Angeles-010578, 010591.
	)	Conflicting preference right
Florence V. Bodkin.	)	and intervening applicants.
		Motion denied.

MOTION FOR REHEARING IN RE DE-
PARTMENTAL DECISION OF MAY 27,
1913.

The Department has considered motion for rehearing filed in the above entitled cause wherein the Department May 27, 1913, rendered decision reversing that of the Commissioner of the General Land Office and canceling the homestead entry involved in said cause allowed June 1, 1912, upon the Application filed by Florence V. Bodkin May 18, 1910, and directing the allowance of the homestead application filed the same date by Charles E. Wells for the same lands upon proper showing of his present qualifications to make such entry, for the stated reason that said Bodkin had died March 25, 1912, prior to the allowance of her entry, following the Department's decision in the case of Garvey v. Tuiska (41 L.D., 510), holding that no descendable right attaches to a mere application to make homestead entry.

It appears from the record that said Bodkin filed contest against a prior entry for said lands made by

one J. H. Geiger under which Geiger relinquished his entry March 7, 1908, and Bodkin was notified July 1, 1908, of her preference right accordingly and that same would be held suspended awaiting restoration of said lands to entry, the same then being under a first form withdrawal. On January 10, 1910, order was issued restoring said lands to settlement April 18, and to entry May 18, 1910, on which latter date said Bodkin and said Wells filed simultaneous applications for entry, Wells stating he had settled on said lands, the date not stated, which were suspended for investigation by the surveyor general, and upon such suspension being removed Bodkin's application was allowed June 1, 1912, and Wells' rejected for conflict therewith June 3, 1912. The Commissioner November 15, 1912, affirmed such action, holding that no settlement by another could deprive Bodkin of her preference right of entry, and that her application duly filed was equivalent to an actual entry.

The Department in the case of *Garvey v. Tuiska* cited, held that Tuiska acquired no right by the filing of his application that could descend to his widow or heirs or be disposed of by sale, the reason assigned for such holding being that 'Congress has made no provision for succession and descent with reference to a mere application to enter.'

It is urged that Bodkin's application is not a 'mere application to enter', but, by reason of having been filed by her under her preference right as successful contestant against Geiger's entry, is based

upon a statutory right of entry given by the act of May 14, 1880 (21 Stat., 140—), and preserved, as contended, to her heirs by the act of July 26, 1892 (27 Stat., 270).

The former act provides that such contestant 'shall be allowed thirty days from date of such notice (of cancellation of the contested entry) to enter said lands', and the latter act provides:

'That should any person who has initiated a contest die before the final termination of the same, said contest shall not abate by reason thereof, but his heirs who are citizens of the United States, may continue the prosecution under such rules and regulations as the Secretary of the Interior may prescribe, and said heirs shall be entitled to the same rights under this act that contestant would have been if his death had not occurred.'

While a contest is terminated so far as the contestee and his rights under his contested entry are concerned when such entry is canceled, it cannot fairly be said that the contest is thereby terminated as regards the contestant and his statutory rights based thereon. He is given by the act of May 14, 1880 (*supra*), if a qualified person, a right of entry, as to the lands involved, as a reward for initiating contest and prosecuting same to a cancellation of the contested entry, and he must be assumed to have in contemplation when he initiates his contest, as he is required by the present rules of practice to have, the ultimate making of an entry based on such contest as its fruition and end. His contest carries

with it, therefore, an incipient and inchoate statutory right of entry and is in legal effect subsisting as between him and the United States, as the basis for such right of entry, until said right is exercised, waived or lost by some act of his or is foreclosed by some interest of the Government or by limitation of the law. Neither the contestee nor any other person can, by settlement or otherwise, acquire any interest in the lands after initiation of the contest and prior to termination of the contestant's right of entry based by the statute thereon which is superior to such right in the contestant. *Therbjorsen v. Hindman* (38 L.D., 335).

The purpose of the act of July 26, 1892 (*supra*), giving to a contestant's heirs the right of succession to his contest and title to 'the same rights' he would have if he had not died, was, as stated in the case of *Heirs of Robert M. Everett* (40 L.D., 608):

' . . . to provide a means whereby the heirs of a deceased contestant might derive the same benefits from a contest commenced by their ancestor in his lifetime that such ancestor himself might have been entitled to had he lived; that is, the joint right of the heirs to continue the prosecution of a contest and a preference right to make entry of the land by all of said heirs who are citizens of the United States.'

This statute was manifestly enacted in recognition of the rights acquired and acquirable by a contestant under his contest, and was designed to se-

cure all such rights to the contestant's heirs. To restrict the term used, 'the final termination of the' contest, to the termination thereof as regards the contestee, only, would be contrary to the reason and purpose of the act. No interest of the contestee called for the enactment of such a law. The interest of the contestant, however, based upon a consideration, the payment of the costs of contest on the promise of a prospective right of entry, called for just such an enactment which should secure to such contestant and to his heirs that for which such consideration had been given by him, in part if not wholly as in the present case; and good faith on the part of the United States with such contestant required such an enactment to apply to all cases where the contestant's death intervenes before the right of entry given him inchoately with his privilege of contest is merged into actual entry or otherwise extinguished in some of the ways indicated. It is within the reason and spirit of the statute so to construe it, and such construction is consonant to the terms and necessary to effect the purpose and object of the statute. 'Where a provision admits of more than one construction, that one will be adopted which best serves to carry out the purposes of the act.' *Bernier v. Bernier* (147 U. S. 242).

The reason assigned for the holding in the case of *Garvey v. Tuiska* (*supra*), that Congress has made no provision for succession and descent with reference to a mere application to enter, does not there-

fore apply in the case of an application to enter filed under a contestant's preference right, but in such cases, by the act of July 26, 1892 (*supra*), the contestant's heirs have the right to perfect such application filed by him and pending at his death and to make entry thereon.

In this case, however, it appears that Bodkin's heirs are her father and mother, equally, and that her father has made homestead entry in his own right, which precludes him and his wife as heirs of this daughter from perfecting the application filed by her under her preference right as successful contestant against the prior entry for the lands and erroneously allowed after her death; as heirs making homestead entry under a preference right initiated in their ancestor whom they succeed under said act of July 26, 1892, must comply with all provisions of the homestead law, and reside upon improve and cultivate the land the same as would their ancestor himself have been required to do had he made such entry. *Becker v. Bjerke* (36 L.D., 26); *Heirs of Robert M. Averett* (*supra*).

Bodkin's entry must, therefore, be canceled for the reasons above stated; and while Wells' application when filed was properly subject to rejection because of Bodkin's superior right of entry, and his settlement prior to her death was wholly a trespass upon her rights, no legal reason now exists for rejecting his application, which was only suspended until its rejection June 3, 1912, and same should be allowed.

This motion is accordingly, for the reasons above appearing, denied.

(Sgd.) Andreas A. Jones,
First Assistant Secretary."

11. That defendants, as heirs of Florence V. Bodkin, thereafter filed and presented their petition to the Secretary of the Interior for the exercise of his supervisory authority in the matter embraced in said decisions, and on January 3, 1914, the Secretary rendered his decision in the following language:

"DEPARTMENT OF THE INTERIOR
Washington.

D-23027

Jan 3, 1914

Charles E. Wells	)	"H"
v.	)	Los Angeles 010578,
Heirs of Florence V.	)	010591. Conflicting pref-
Bodkin.	)	erence right applicant's
		heirs and intervening
		applicant.

Remanded.

PETITION FOR THE EXERCISE OF SUPER-
VISORY AUTHORITY.

The Department has considered the petition for the exercise of its supervisory authority filed by the heirs of Florence V. Bodkin in the above entitled cause, wherein decisions were rendered May 27, 1913, on appeal, reversing that of the Commissioner of the General Land Office and cancelling said Bod-

kin's homestead entry allowed after her death upon her application filed, under an acquired preference right, prior thereto, and August 29, 1913, on motion for rehearing, which was denied (42 L.D., 340), holding that, while said entry was erroneously allowed in the name of Bodkin, and that entry on her application pending at her death was only allowable in the name of her heirs, yet her heirs, her father and mother, cannot be allowed to make such entry because of its incompatibility and conflict with the homestead entry already made by her father, as the required compliance with law could not be made by him on both entries covering the same period of time.

It is urged in this petition that Bodkin's homestead application lapsed at her death, and that her heirs acquired a right to exercise her preference right by any other form of entry or purchase they desired; also, that they have a right thus to perfect her preference right by reason of the fact her exercise of such preference right was under suspension by the government, while the lands involved were embraced in a first-form withdrawal thereof, and her application while said lands were being investigated by the surveyor general until after her death, and of the further stated fact she was prevented from establishing residence or settling on the lands by threats, intimidation and violence on the part of one Charles E. Wells, an adverse interven-

ing settler and applicant, whose application filed simultaneously with hers the Department directed be allowed.

As Bodkin's death occurred long after thirty days from restoration of said lands and notice to her of such restoration, and she had within said thirty days, the preference right period, exercised such right by filing her homestead application, both her and her heirs' rights in the premises are concluded and fixed so far as the form of entry under such preference right is concerned, and no substitution for her homestead application of some other form of entry or purchase after said thirty days could have been made by her or can be by her heirs so as to preserve such preference right or extend same beyond said thirty days.

The fact of the suspension, for governmental or administrative purposes, of the exercise of her preference right and of her application is immaterial and has no bearing on the case whatever.

As stated in the decision on the motion for rehearing herein, Well's settlement prior to Bodkin's death was 'wholly a trespass upon her rights', and his application was properly subject to rejection when filed. He is a party to the record but not in interest from any legal standpoint, and his appearance in the case is without prejudice to the right of Bodkin's heirs to perfect her application for entry. If guilty of having, by threats, intimidation and violence, prevented Bodkin from making settle-

ment on the lands to which she had preference right of entry, and enjoying the benefit of such right from and after April 18, 1910, the date when said lands were restored to settlement and when she is alleged to have attempted and to have been thus prevented by him from settling, he should not be allowed to profit by his wrong if her heirs now desire to perfect her application by making entry thereon, which they have the technical right to do independently of any such threats, intimidations and violence, and notwithstanding the homestead entry made by her father, one of said heirs. He may not perfect both homestead entries, as he could not comply with the law as to both, but he may elect which he will perfect, and the fact he has already made homestead entry in his own right does not now preclude his election to make and perfect homestead entry, as co-heir with his wife, based upon the application of his daughter, notwithstanding his present entry or Wells' appearance in the case.

Thirty days from notice of this decision is therefore hereby allowed the father of said Florence V. Bodkin, appearing herein as one of her heirs, to elect whether he will relinquish his present homestead entry and make, with his wife as co-heir, homestead entry based upon said Florence V. Bodkin's application, at the expiration of which period further adjudication will be had.

The case is remanded for action in accordance with the foregoing.

First Assistant Secretary."

That decision was signed by some Assistant Secretary.

H. M. W.

D. V. N.

12. That on January 26, 1914, the Commissioner of the General Land Office made and sent the following letter and order to the Register and Receiver at Los Angeles, California, to-wit:

“Los Angeles, 010578.

In reply please refer to:

“H”

J.L.M.

DEPARTMENT OF THE INTERIOR

General Land Office,
Washington.

ADDRESS ONLY THE
COMMISSIONER OF THE GENERAL LAND
OFFICE.

Jan. 26, 1914.

Charles E. Wells)

v.)

Heirs of Florence V. Bodkin.)

Register and Receiver,
Los Angeles, California.

Sirs:

September 18, 1913, this office, by direction of the Department, cancelled H. E. 010578, for NW 1/4 Sec. 11, T. 7 S., R. 22 E., made by Florence V. Bodkin, and closed the above-entitled case, and you were

directed to allow Charles E. Wells to make entry of the land.

You will find herewith copies of departmental decision of January 3, 1914, directing that the father of Florence V. Bodkin be allowed thirty days to elect whether he will relinquish his present homestead entry and make, with his wife as co-heir, homestead entry based upon said Florence V. Bodkin's application, at the expiration of which period further adjudication will be made.

You will promptly notify the parties of the decision of the Department, and in due time report action taken.

Very Respectfully,
(Sgd.) C. M. Bruce,
Assistant Commissioner."

13. Plaintiff introduced in evidence the portion of the serial Homestead Docket kept in the local land office, containing entries relating to the homestead entry of Patrick H. Bodkin, as one of the heirs of Florence V. Bodkin, being Homestead Application Serial No. 022872, which entries were and are as follows:

	01877
"KIND: Hd.	SERIAL No. 02872
<hr/>	
NAME	
Patrick H. Bodkin one of the heirs for the heirs of Florence V. Bodkin, deceased.	
ADDRESS	
Neighbours, Cal.	

DESCRIPTION	TOWN-			
OF LAND	SECTION.	SHIP.	RANGE.	AREA.
Tract 78 N-W-1/2	11	7S	22E	160
DATE	Receipt No 1374213	NOTATIONS. \$16.00		
Mar-6 1914	Application and suspended for copy of Natl. papers. See "H" 1/26/14—Per- sonal Service.			
Mar-9 1914	Natl. certificate filed.			
9	Allowed.			
Sept 22	Application to contest filed. C-No 2857 (4)			
1917				
Mar 2	Notice of 3-year proof filed.			
April 18	Notice of Intention to offer 3-Yr. Proof filed.			
May 1	Notice for Pub. issued—R. & R. 6/6/17 Published in Blythe Herald.			
28	Chief of Field Division advises "No investigation warranted".			
June 6	Proof of publication filed.			
25	Notice of Intention to offer 3-Yr. proof filed			
" 27	Notice for Pub. issued—R. & R. 8/7/17 9 A.M.			
1917				
Aug 7	C.F.D. advises "No investigation war- ranted." Final proof made—Re. No 1913842—\$10.00 (4.00) Testy fee)			

(6.00 Com.) suspended for proof
of publication and
evidence of natural-
ization.

1917

- Aug 13 Proof of Pub. filed.
Aug 17 F/C issued—Dup. to claimant (9/5/17)
Aug 17 Evidence of naturalization filed.
Sept 8 F. P. and related papers to G. L. O with
8/17 returns.
Sept 27 “C” CPC 9/20/19 corrects description
to read Tract 78 T. 7S. R. 22E. accord-
ing to Plat of Re—Sur. approved 4/1/18
also this entry to Heirs of Florence V.
Bodkin.
Oct 11 Final Certificate returned corrected and
again mailed to P.H.B.
Nov 10 Patent 714711 Issued 10/23/19 received
and claimants notified.

1920

- Jan 5 Patent to P. H. Bodkin by mail at
Neighbors, Calif.”

14. That on March 6, 1914, Patrick H. Bodkin, one of the heirs and for the heirs of Florence V. Bodkin, deceased, filed an application to enter, under Section 2289, Revised Statutes of the United States, the said N. W. $\frac{1}{4}$ Section 11, Township 7 South, Range 22 East, S. B. Meridian, said application bearing serial number 022872, and being in the usual and proper form for homestead entry, and paid the fees of \$16.00 required.

15. That attached to said homestead application, No. 022872, and filed therewith, is an affidavit of Patrick H. Bodkin and Bella E. Bodkin, the defendants herein, which affidavit is in the following words and figures:

“In the Matter of Application of Patrick H. Bodkin and Bella E. Bodkin, his wife, the sole and legal heirs of Florence V. Bodkin, deceased, to make homestead entry of NW 1/4 Sec. 11, T. 7S., R. 22E., S.B.M.

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, SS:

Patrick H. Bodkin and Bella E. Bodkin, the sole and legal heirs of Florence V. Bodkin, deceased, being first duly sworn, each for himself doth depose and say: That Florence V. Bodkin, daughter of these applicants, died on the 25th day of March, 1912; that prior to her death and on the 18th day of May, 1910, said Florence V. Bodkin, under preference right granted to her by the Department of the Interior, made homestead application, Serial No. 010578, for the NW 1/4 Sec. 11, T. 7S., R. 22E., S.B.M., and on June 1, 1912, entry receipt was issued therefor by the Register and Receiver of the United States Land Office at Los Angeles, California; that under letter “H” of January 3, 1914, the Secretary of the Interior has directed, that the heirs of Florence V. Bodkin may perfect her application by making entry thereon; that Patrick H. Bodkin made homestead entry No. 010652 for the NE 1/4 Sec. 11,

T. 7S., R. 22E., and the Secretary of the Interior has directed, by said letter "H", that said Patrick H. Bodkin to elect whether he will relinquish his prior homestead entry and make with his wife as co-heir, homestead entry based upon Florence V. Bodkin's application; that Patrick H. Bodkin, one of these affiants, has made such election and relinquished said homestead entry No. 010652 for the NE 1/4 of Sec. 11, T. 7S., R. 22E., S.M.B., and jointly, with his wife, as the co-heir of their said daughter Florence V. Bodkin, make application to perfect the application of said Florence V. Bodkin to enter the NW 1/4 of Sec. 11, T. 7S., R. 22E., S.B.M.; that Patrick H. Bodkin, one of the affiants in this affidavit mentioned, was born in Ireland under the Kingdom of Great Britain and has been duly naturalized as a citizen of the United States under the naturalization laws of the United States and was naturalized in the year 1910, a certified copy of said naturalization certificate is made a part of this application; that Bella E. Bodkin, the other affiant in this affidavit mentioned, was born in the State of Ohio, United States of America, and that these affiants were married on the 31st day of January, 1879, in the State of Iowa and ever since have been and now are husband and wife, and are the sole and legal heirs of said Florence V. Bodkin, deceased; that these affiants reside on the NE 1/4 Sec. 11, T. 7S., R. 22E., S.B.M., in Riverside County, California; that affiant Patrick H. Bodkin, has not heretofore made any entry under

the homestead laws, except homestead entry No. 010652 for the NE 1/4 Sec. 11, T. 7S., R. 22E., S.B.M., Los Angeles Land district, the application for which was made May 18, 1910 and allowed June 1, 1912, which homestead entry was on this 6th day of March, 1914, relinquished to the Government of the United States without any consideration whatever therefor.

(Sgd.) P. H. Bodkin.

Patrick H. Bodkin.

(Sgd.) Bella E. Bodkin.

Subscribed and sworn to before me
this 6th day of March, 1914.

(Sgd.) Frank Buren, Register."

16. That on May 2, 1914, the Commissioner of the General Land Office made and transmitted to the Register and Receiver of the Los Angeles land office a letter and order in the following language:

"In reply please refer to:

"H" Los Angeles 010591 J.L.M.
Inc.

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Washington.

Address only the Commissioner of
the General Land Office.

May 2, 1914.

Charles E. Wells)
v.) Entry canceled—Case closed.
Heirs of)
Florence V. Bodkin)

Register and Receiver,
Los Angeles, California.

Sirs:

January 3, 1914, the Department directed that Patrick Henry Bodkin, as co-heir with his wife, be allowed to make homestead entry of the NW 1/4, Sec. 11, T. 7S., R. 22E., provided he relinquished his H. E. No. 010652 for NE 1/4, Sec. 11, T. 7S., R. 22E., and in the event of his so doing H. E. No. 010591, for said NW 1/4, made May 18, 1910, by Charles E. Wells should be canceled.

Said decision was promulgated by letter "H" of January 26, 1914, and you were directed to notify Bodkin of his right to proceed thereunder, and this office is now in receipt of H. E. No. 022872, made by Bodkin, March 6, 1914, with his relinquishment of the NE 1/4, Sec. 11, T. 7S., R. 22E.

The homestead entry of Bodkin, No. 010652, for NE 1/4 has been canceled upon the records of this office as of date of March 6, 1914, H. E. No. 010591, of Wells for the NW 1/4 Sec. 11, T. 7S., R. 22 E., has been canceled this day and the case of Wells V. Heirs of Bodkin is hereby closed.

Very respectfully,

(Sgd.) John W. P. Laul (?)

Assistant Commissioner."

17. That on September 22, 1914, Charles E. Wells filed in the land office at Los Angeles, California, his application to contest the homestead entry of Patrick H. Bodkin, as heir and for the heirs of Florence V. Bodkin, deceased, which application was and is in the following language:

(Rubber stamp) "Received, U.S.LAND OFFICE,
Los Angeles, Cal.

APPLICATION TO CONTEST

(Note.--This application must be filed in duplicate).

DEPARTMENT OF THE INTERIOR, Serial No.....

United States Land Office. Contest No.....

Los Angeles, California.

I, the undersigned, Charles E. Wells, residing at Blythe, California, being duly sworn, upon my oath state: That I am well acquainted with the tract of land embraced in Homestead entry, Serial No. 022872, made on March 6, 1914, by Patrick H. Bodkin & Wife, as heirs of Florence V. Bodkin, whose present place of residence is Neighbours, State of California, for the N.W.Qr. Section 11, Township 7 S, Range 22 E., S.B.M. Meridian, and know the present condition of the same; that said land is partly reclaimed desert in character; that in so far as I know the said entry is the only proceeding now pending for the acquisition of title to said land except my own; That said Patrick H. Bodkin secured the cancellation of the existing entry of Charles E. Wells,

and the allowance of his own entry as heir of Florence V. Bodkin, by fraud and perjury, he charging Wells with intimidation against Florence V. Bodkin, which charge was accepted by the Department as true, without a hearing to determine its credibility, and that the charge is false in every particular; that I claim an interest in or desire and intend, if permitted to do so, to acquire title to the said land under the provisions of the Homestead law, and state the following facts which show my qualifications to do so: I am not under the age of twenty-one years, I am a citizen of the United States, or have declared my intention to become such, I have not heretofore made any entry which would disqualify me from making entry under the above-mentioned law, I have not since August 30, 1890, acquired title to, nor am I now claiming under any of the agricultural land laws, an amount of land which, together with the land described above, or the part thereof which I desire to enter, will exceed in the aggregate 320 acres, and I am not the proprietor of more than 160 acres of land in any State or Territory; and I further swear that this contest is not being collusively or speculatively initiated, but is being instituted and will be diligently prosecuted in good faith for the sole privilege of acquiring title to said land or some part thereof in my own and sole interest.

I, therefore, ask that I be permitted to prove the allegations made in this affidavit at such time and place as may be named therefor, and that after proving said allegations, and my payment of all the costs

incurred in this proceeding, I be permitted to make entry of said lands or a part thereof under the laws above specified.

I desire that all papers affecting this contest be served upon me at the following address: Blythe, California.

(Sgd.) Charles E. Wells.

(The above document bears a pencil correction, changing the figure 010591 to "022872", in the first paragraph thereof.)

I hereby certify that the foregoing affidavit was subscribed and sworn to before me by the affiant named therein, after it had been read to or by him, in myppresence, in Blythe, Calif., on this 18th day of Sept., 1914, he, the said affiant, being well known to me to be the same person he therein represents himself to be, or having been fully made known to me as such person by of who is well known to me.

(Sgd.) James O. Phillips,
Notary Public. (SEAL)

Also appeared, at the same time and place, A. J. McLaren residing at Blythe, Calif., and S. H. Guthrey, residing at Blythe, Calif., who being duly sworn, depose and say: That they are acquainted with the tract described in the above affidavit, and know from personal knowledge and observation that the statements therein made are true.

(Sgd.) A. J. McLaren.

(Sgd.) S. H. Guthrey.

I hereby certify that the foregoing affidavit was read to or by affiants in my presence before *affaints* affixed signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by); and that the said affidavit was duly subscribed before me at Blythe, Calif., this 18th day of Sept., 1914.

(Sgd.) James O. Phillips, (SEAL)
Notary Public.

Note: If the application is filed by a person not seeking to acquire title to or claiming an interest in the land, or by one who does not show his qualifications as an entryman, it must be referred to the Chief of Field Division."

18. That on September 22, 1914, the Register and Receiver of the local land office at Los Angeles, California, rejected said application to contest, and endorsed thereon the following:

"Rejected Sep. 22, 1914 because allegations of contest do not state facts sufficient to constitute cause of action."

19. That notice of such rejection was given to Charles E. Wells, and on October 28, 1914, he filed in the local land office a notice of appeal therefrom to the Commissioner of the General Land Office, in the following language:

**“DEPARTMENT OF THE INTERIOR
BEFORE THE HONORABLE COMMISSIONER**

Charles E. Wells)

)

vs.) Appeal, Contest 2857 C.A.S.

)

Patrick H. Bodkin) “H” 022872 Los Angeles.

)

and wife.)

Comes now Charles E. Wells and appeals to the Honorable Commissioner from the rejection by the Register and Receiver of the application of Wells to contest the entry of Bodkin.

The decision of the Honorable Register and Receiver is not only an error, but the most grievously possible error, Wells’ application to contest alleges fraud and perjury as grounds of contest, and no more sufficient grounds of contest are possible of allegation, or more incumbent on the Department to hear.

Respectfully submitted.

(Sgd.) Charles E. Wells, Contestant.”

20. That on November 1, 1914, the Register and Receiver at Los Angeles, California transmitted to the Commissioner said application to contest and notice of appeal, together with a letter in the following language:

“DEPARTMENT OF THE INTERIOR
UNITED STATES LAND OFFICE

022872 Los Angeles, Cal., CONTEST 2857, Transmitting rej. Nov. 1, 1914.

contest & appeal. 8 encls. C. A. S.

Hon. Commissioner General Land Office,
Washington, D. C.

Sir:- We transmit herewith Application of Charles E. Wells to contest 022872 of Patrick H. Bodkin and wife, heirs of Florence V. Bodkin, NW 1/4 sec. 11, T. 7 S. R. 22 E. S.B.M., said contest having been rejected by this office Sep. 22, 1914 and contestant notified by registered mail, evidence of service herewith.

We also enclose appeal of contestant from said rejection filed Oct. 28, 1914.

Respectfully,

(Sgd.) John D. Roche, Register.

(Sgd.) Alex Mitchell, Receiver.

(Rubber stamp) Received Nov. 9 19 G.L.O.”

21. That plaintiff was thereupon sworn on his own behalf, and testified as follows:

My name is Charles E. Wells, plaintiff in this action. I reside at Blythe, Riverside County, California, and have for 12 years past. I have been Justice of the Peace since 1915, and Deputy County Assessor and City Recorder for Blythe. I am acquainted with the northwest quarter of Section 11, Township 7 South, Range 22 East; first become acquainted with the land in 1908. I am the Charles E. Wells who

filed the application for a homestead entry on this quarter-section on May 18, 1910. I first arrived in the neighborhood of this quarter section in May, 1908, coming in immigrant wagons with about four or five families. Of my immediate family there was about four married sons and their families, and two single sons, and one daughter. My wife was with me. I established myself at that time near the northeast corner of the quarter, in the county road; it was the county road then, and is yet. From May, 1908 until the date that these lands were open to settlement on April 18, 1910, I remained with my family right there in the road in that camp. On April 18, 1910, I went over the land; over the quarter, with other neighbors, to see if there was anybody else settled on it, and found no one. Touching the matter of settlement, I got ready to make our application and came to the Land Office. The boundaries of the quarter section were fairly well marked on the ground so that they might be readily traced. I remained on the quarter section from the 18th of April until the 18th of May, 1910, and on the latter date I personally filed the application to homestead, which has been introduced in evidence here, in the Land Office here in Los Angeles. After April 18, 1910, I remained on the quarter section until September 15, 1914. During that period, in the way of erecting improvements upon the land, I erected a house, a corral, put down wells, cleared the land,--altogether between 70 and 80 acres. I cultivated 60 acres, beginning the cultivation after my application

was accepted, when I procured water for 60 acres--60 shares of water stock; it cost \$26.50 a share. This was in the year 1913. Prior to 1913, and after May 18, 1910, I cultivated some of the land, using only overflow water. I raised a little crop from the waste water from the place adjoining it. I was not enabled to raise crops until after I procured water stock. When I removed from the premises on September 15, 1914, I had 60 acres in cultivation. I had the greater portion of it in wheat and barley. I took the barley off and put in cotton. There was a cotton crop on the land when I was ejected. On 20 acres it was all cotton, and then I had planted cotton on the barley land, after taking the barley off. It was scattered; I did not get a good stand. There was quite a sprinkle of cotton on the other 40. From April 18, 1910, until September 15, 1914, there was no time when I and my family were not there. We resided there continually.

When I went over the quarter on April 18, 1910, I knew Florence V. Bodkin, that is, I had seen her and knew her by sight. Neither she nor anyone else had settled upon the land, and no one made any effort to settle upon that land between April 18, 1910 and May, 1910, except myself. The same acreage, namely, 60 acres, has been available for, and under cultivation since September, 1914.

Mr. Bodkin became possessed of the lands on the 15th day of September, 1914. That is the day I vacated, and for the balance of that year—three and one-half months—he had the use of the sixty acres.

There was a cotton crop on the place when I removed from the land under this judgment on September 15, 1914. I did not pick. I could not say who did. Mr. Bodkin was on the premises. He claimed rent on the premises, and after the cotton was picked my recollection is now that his son and one of my boys that put in this cotton, or helped him put it in, in some way divided the crop. I could not say now what portion of the crop came to me. Very little of it would have come to me at all. I could not say the value of the crop.

CROSS EXAMINATION.

I first came to the vicinity of the land involved in this case in May, 1908. I had four married sons and two single sons, a daughter and my wife, and the four married sons' families. I came from Yuma to Blythe. I did not know the particular tract of land that I was going to locate upon when I left Yuma; I had seen no map of this vicinity before I left Yuma. I procured a map in the Land Office here on the 17th day of June, 1908, and then I found where I was. When I got to this particular community I found other settlers there. I traveled on the county road from Old Palo Verde to where it stopped. I was on that county road; it was a well defined and established county road. The mail traveled it. It was a 60-foot road. I camped several places. I first camped on the northwest corner of it, that is by the road, and some time after that I moved higher up, and I moved east along the road.

near the northeast corner of the quarter where the improvements are now. We did not know where the center line of the road was; it was all brush. It was a well defined county road. During all times during the years 1908 and 1909 and up to May, 1910, I confined our occupation to that county road. I did some work upon the land in the vicinity. I put in a crop on section 2, a cotton crop—or a corn crop—in 1908, I got water from the farmers' ditch on the the northeast corner of the northwest quarter of section 2, township 7. I raised a crop on that land. That would be north and east of me. I made no permanent improvements of any kind on the land involved in this action between May, 1908 and until April, 1910, and continued to reside along side this land in a camp on the county road, in a cornstalk and weed tent. I knew it was Government land. As I said, I got a plat that showed me it was Government land, and I had a right on it. I did not consider I was a trespasser. I had no right and knew that I could initiate no rights to the land. This tract of land on which I raised a crop was Government land that had never been filed on. I did not consider I was a trespasser anywhere on Government land. I was an American Citizen. I do not remember just what time I cleared any brush on this northwest quarter of section 11. I cleared brush on it all the time, more or less. When I had nothing else to do I put in my time clearing the land and cutting brush. I cleared on this quarter section, too.

I don't remember when I first began that clearing, but it was not prior to 1910. I raised my first crop on this northeast of 2, in 1908. I put down a well on this quarter section, one in 1908, and in 1910, after I made settlement on it, I put down a cased well, both on this quarter section, but the first one was in the road, as I said. In 1910, I built a horse corral there, and put the second well down in the corral. I first acquired a water right for this land after my filing was accepted in 1913. Prior to acquiring that water right, I had raised a little on some overflow from waste water, as I said before. I think it was in 1908 that I first cultivated the land by the use of waste water, about 4 or 5 or 6 acres. That was the only time I used waste water. We never got any more. I bought water stock after my filing was accepted; I used waste water only that one year. We didn't have any water in 1909. The water right for the 60 acres cost me \$26.50 a share—an acre.

On May 18, 1910, when I appeared at the Land Office to make an application to file upon this land, I think I met Florence V. Bodkin at the Land Office, also. I had met her before that, but I did not know that she was claiming a preference right to file upon this land by virtue of a contest that she had filed against the Geiger entry. I would like to explain: I think the first time I ever saw Mr. Bodkin was in June, 1908. He told me that I was living on his daughter's land, and I said: "Oh, no, Mr.

Bodkin, I am living on Government land." That was on the 17th day of June, 1908, in the Land Office. He told me I was on his daughter's land. I said, "No, no, Mr. Bodkin; I am on Government land." I had a plat in my hand then. I didn't know when I made my application on May 18, 1910, that Florence V. Bodkin had made an application to file upon the same quarter-section. I didn't know what she was going to do. As a matter of fact, I don't know that she made her application on that day, before I made mine. I don't know of my own knowledge.

REDIRECT EXAMINATION.

After May 18, 1910, I erected a residence on this quarter-section; a house 16 x 24 feet, with a porch on it, made of native material—willow poles and adobe, except the floors and windows and doors, which were shipped from Los Angeles, and were made of pine. They were regular doors and windows and a pine floor. The house was roofed over 3 or 4 deep. There were two main rooms and it was porched on three sides, and there was a second well under the porch. That was the third well I put down. I, with my wife and children continued to reside in that habitation until we were ejected by an order from the Superior Court of Riverside County. These wells I speak of, two of them were drove wells, 20 feet deep, and one was a cased 6-inch well, to 60 feet deep. By a "drove" well, I mean a well that is driven down to the water with a sand

point. I raised water by a suction pump, and applied the water to supplying 20 head of horses and for domestic use. We were freighting, and a lot of the other neighbors were freighting, and they all used that well. It was in the road, as I told you. After I filed my application, I sank a cased well by the corral, after I built a wire corral about 6 x 10 rod or something like that in dimension, may be 15 rod, and 6 foot high. The diameter of the well was 6 inches; and that well furnished us with sufficient water for household and domestic and stock purposes.

RECROSS EXAMINATION.

I was put off that Government land as a forcible detainer by the Superior Court of Riverside County. I was ejected. I filed a bond to appeal, I considered it hopeless to do it. I never followed up the appeal; that was as far as it got.

CROSS EXAMINATION—Resumed.

I cleared a patch on the southeast corner where the water was wasting on in 1908; I raised a little crop on the corner of it from waste water that Mr. Edwards ran over there. Otherwise, I never occupied that property, not to make any claim to it.

Q. I show you a document entitled "Department of the Interior, Washington", under No. D23027, entitled "Charles E. Wells vs. Florence V. Bodkin", Los Angeles, 010578, 010591, application for rehear-

ing; affidavit showing no cause for re-opening; affidavit of C. E. Wells bearing date the 21st day of August, 1913," and ask if that is your signature; (handing papers to witness).

A. Well, sir, I couldn't say that it was.

Q. This document appears to have been sworn to before Jess I. Bodkin, a notary public.

A. Yes. I don't think I signed that affidavit.

REDIRECT EXAMINATION.

Q. Mr. Wells, will you look at that signature on the document handed you by Mr. Noland?

A. It looks like my signature, but I wouldn't be positive. As I say, I don't remember ever making an affidavit before Jesse I. Bodkin. That looks like my signature, I say, but I don't recall it. I don't remember having filed an affidavit with the Secretary of the Interior on the application of Mr. Bodkin for a rehearing. I can't say positively that I did. I say I don't remember ever signing a document before Jesse I. Bodkin. I don't deny that that is my signature, but I don't say that I signed that signature there. I say, I don't deny the signature.

Thereupon defendant offered, and there was received in evidence the document referred to in the above testimony, which document was marked Exhibit A, and is in the words and figures following, to-wit:

**“DEPARTMENT OF THE INTERIOR
WASHINGTON**

D-23027

Charles E. Wells	)	“H”
	)	Los Angeles 010578, 010591,
vs.	)	Application for re-hearing,
	)	affidavits showing no cause
Florence V. Bodkin	)	for reopening.

(Rubber stamp) Dept. of the Interior,
Received Sep 18 1913 to Genl.
Land Office, Secy's Off.--Mails &
files.

(Rubber stamp) Dept. of the Interior,
Received Aug 28 1913 to Genl.
Land Office, Secy's Off.--Mails &
files.

AFFIDAVIT OF C. E. WELLS.

C. E. Wells, being duly sworn, on his oath says, that he is the C. E. Wells that made application to file on the N.W.¹/₄ of Sec. 11, T. 7 S., R. 22 E. S.B.M., that he lived upon and occupied the land prior to the proclamation of the Secretary of the Interior of Jan. 10, 1910, that his intention in so residing on and occupying the land was to file a homestead upon the same in the event the Government did not require the land for purposes of the withdrawal, and should therefore restore the land to entry, that there was no law against such occupation and improvement, made with the understanding and at

the risk assumed of loss to the Government, should the Government require the lands for the purposes of the withdrawal, that at the time of such settlement he posted notice on the land specifying that such settlement was made subject to the action of the Government under the provisions of the Reclamation Act, that the land being subject to a first form withdrawal, the conditions of which specified that the lands were "not subject to any form of disposition" while subject to such withdrawal, he therefore expected to secure no priority by reason of any acts of his prior to restoration, and he felt sure that no one else could secure such priority prior to restoration, that he settled upon and improved the land from information contained in a township plat purchased from the Los Angeles Land Office which is hereby made a separate exhibit, "A" and which shows this land at that time to be vacant public land, and knowing that the status of the land was such that no priority could attach during the pendency of the first form withdrawal, he expected no priority by settlement under the law of May 14, 1880, for he was aware this provision of the law concerned only open land, and he merely claimed the right to maintain his settlement and occupation subject to the future disposition of the land by the Government. That being informed by one Patrick H. Bodkin that notwithstanding the status of the land, his daughter Florence V. claimed a priority to file on this land, he, (Wells) made overtures to her to purchase her

waiver of such supposed right, not because such right was believed to exist, but merely through courtesy to the girl, that she replied with these identical words, 'You will have to see Papa', that believing the girl, who seemed to be under the complete domination of her parents, had performed no act in connection with said suppositious right of her own initiative, he refused to confer with any third party concerning such right, preferring to stand on the known status of the land.

That Florence V. Bodkin was the companion and playmate of his daughter, and friendly with every member of his family and his neighbors families, not sharing the 'Antagonism' assumed by other preference rights claimants, that she was at the time in delicate health, unable and indisposed to undertake such separate living as 'settlement' would entail, that the affidavit of one Fleisher, and he, Wells, would have attacked this young, delicate and friendly disposed girl, is as preposterous as to say he would have attacked his own daughter, that the advices acted upon by this bunch of contestants, including the father of Florence V. Bodkin, was that they did not have to make settlement at that time, and in fact, they did nothing then and have done nothing since, including the father of Florence V. Bodkin, that they did not have to do to show a pretense of good faith.

That it is not possible to suppose that this delicate daughter, at the time but a short journey from the

grave, intended to exceed in zeal this entire contesting community including her father, and establish a residence herself in advance of the time at which they considered themselves forced by the failure of further fortunate withdrawals, to make a pretense of settlement.

Deponent protests against the serious consideration of a charge which is so obviously an afterthought, due to the discovered insufficiency of the former plea of vested right, and deponent calls attention of the Honorable Secretary to the fact that had such alleged intimidation been true, or the parties making the complaint sincere, the charge would have been made at first and not as a last resort, and that not having been made during the regular hearing of the case, can not now be cited as grounds for error in making decision, or as cause for ordering a re-hearing, and is in fact, merely trifling with the Department. He states that the slanderous allusion to 'previous settlers' is unworthy of reply.

(Sgd.) Charles E. Wells.

Subscribed and sworn to before me
this 21st day of Aug. 1913.

(Sgd.) Jesse I. Bodkin, (SEAL)

Notary Public in and for
Riverside County, State of California.

My Commission expires April 22, 1917.

Note: Copies of Appellant's affidavits was received by me Aug. 17th, 1913. (Sgd.) Charles E. Wells."

22. That Robert Culpepper, a witness called on behalf of the plaintiff was then sworn and testified as follows:

DIRECT EXAMINATION.

My name is R. L. Culpepper; I reside at Blythe, and have resided there since 1909. I am a farmer by occupation, and have been farming since 1909 in the Palo Verde Valley. I am acquainted with the Northwest quarter of section 11; first becoming acquainted with it in the summer of 1909, when I got acquainted with Mr. Wells and his family. It looks like about 60 acres that Mr. Wells had cleared and cultivated after 1910. I carried on farming operations in that neighborhood.

I knew Mr. Wells, the plaintiff, in April, 1910, and knew where he was located on the 18th of April, 1910. He was on the quarter-section of 11 involved in this action, and he had with him on the land, his family. After May 18, 1910, I observed what improvements Mr. Wells made and erected on the premises. He built a house there and a corral, and began clearing up this land, grubbing it, clearing the brush off. I lived about a half a mile from him during the time from 1910 to September, 1914. I was there continuously; I would see Mr. Wells sometimes two or three times a week. I would see some of the family nearly every day. Until he moved off, sometime in 1914, he had been residing there on the land continuously. He had cleared, during that time, about 60 acres, I would judge, and he had all of the 60 acres

under cultivation. He had had the water stock for it. He had a lot cleared up that he didn't take water stock for, and didn't cultivate. There was a cotton crop planted upon the 60 acres in the fall of 1914, and that crop was standing when he moved off.

CROSS EXAMINATION.

I first came into this community in 1909. At that time Mr. Wells was on this quarter-section we are talking about; living right there in the road, right close to the line. He had a little shack put up there made out of weeds and cornstalks, the first time I was ever at his place. I was not there in 1908.

23. That William B. Edwards, a witness called on behalf of the plaintiff was then duly sworn and testified as follows:

DIRECT EXAMINATION.

My name is William B. Edwards and I reside at Redlands, California. I am acquainted with the plaintiff, Charles E. Wells. I think I first became acquainted with him in the month of May, 1908. I am acquainted with the Northwest quarter of section 11, township 7 south, range 22 east, involved in this action. I first became acquainted with that quarter-section and the neighborhood in December, 1902. In May, 1908, when I first met Judge Wells, I was living on the quarter-section just east of the northwest quarter—the adjoining quarter. I noticed at that time where Judge Wells and his family had located themselves. It was on a section line running east and west, as near as we knew the line at that

time. He was living in a small tent; it would be on the right-of-way of the county road. I am familiar with the road right-of-way there; it is now laid out and marked by boundaries. At that time Mr. Wells was at the northeast corner. I had put in alfalfa to the northwest corner of my place, and he was just off my northwest corner. I had run out the line as well as I could establish it then. My north line would be the road line, which followed the section line, and he was just over the line on the road right-of-way. He continued to remain at that spot until the 18th of April, 1910, when he moved over on to the land and built a house of poles and adobe, the usual construction in that country. It had two large rooms and a porch on two sides, and that was a substantial building for that community. It was not one that the wind would blow down. It was much better than a great many other habitations erected in that community. With Judge Wells in that residence lived his wife, daughter and two sons at least. I don't know whether there were any more than that stayed there ordinarily. I observed what he did with reference to the land after May 18, 1910. I had some barley in on that southwest quarter of mine, and the water overflowed at the lower end, and he helped me put in mine, and in discing across he disced across as far as the water went and put it all into barley. After May, 1910, he cleared, altogether while he was on there, about 60 acres, and after he got water stock, he had in about all that was cleared, about 60 acres.

There was a couple of years there that he and I together extended the crop over on his land; and after he got water stock he put his in independently. When he moved off the premises, he had in cultivation about 60 acres, which he had been cultivating for about two years before he moved off. I was there in the neighborhood on the night of April 17 and the morning of April 18, 1910. At that time I knew Florence V. Bodkin and knew her father, Patrick H. Bodkin, and her mother. I saw the plaintiff, Charles E. Wells on that occasion. During the first hours of April 18, 1910, we both walked over that quarter-section, and the quarter-section I lived on, too, around the outside boundaries, and I did not observe anybody anywhere on the Wells quarter-section. I remained in that vicinity during the next 30 days and during that time I did not see anybody, other than Judge Wells and his family, settling on or attempting to settle on that quarter-section. I know that Florence V. Bodkin was there in the neighborhood at that time. She was in her father's house, which consisted of a store building just south of there. This store building was not on this quarter-section; it was on a quarter-section to the south,—the southeast quarter of section 11, that not being the quarter occupied by me or by Judge Wells. The property on which the store building was located was that of Mr. Neighbours. That store building was the Bodkin home in the valley, and Miss Bodkin was residing there with her parents.

CROSS EXAMINATION.

In 1908, I was residing on the northeast quarter of section 11. I had planted some barley during that year in the southwest corner of my tract, and it was in that year that I first met Mr. Wells. He was residing on the north line of that quarter-section just west of my land, when I met him. The county road was laid out at that time. It was not surveyed, but it was laid out roughly, the usual width of a county road, about 60 feet. That would be thirty feet on either side of the line given for county roads. There were no fences along it. This crop that I said Mr. Wells raised with waste water from my land was on some of the land next to the southwest corner of my land, and on the southeast corner of the quarter-section occupied by Mr. Wells. He put in just a small patch, and I think he raised crops there from my waste water for a couple of years, in 1908 and 1910. I don't think he used that waste water in 1910.

Mr. Wells moved over and built a house the 18th of May, 1910, a little farther south from where he was first located, and possibly, a few feet farther east.

24. That Harry E. Wells, a witness called on behalf of the plaintiff was then duly sworn, and testified as follows

DIRECT EXAMINATION

My name is Harry E. Wells. I reside at Blythe and am the son of Charles E. Wells, the plaintiff.

I have lived in the Palo Verde Valley about 12 years, going there at the time my father went. I am one of the married sons that arrived there with him. We arrived in the Palo Verde Valley in May, 1908, and located at that time on the northeast corner. He erected a tent and shed on the road. My father remained in that spot about two years, until he filed his homestead application. During that two years I was living about two miles north and east. After May 18, 1910, my father cleared up about 65 or 70 acres, and built a house, we called it a stick-in-the-mud, consisting of two rooms. This house was about the same as other habitations in the community. He also had a corral, a pump and well, and he cultivated about 60 acres of the land after 1910, and there were 60 acres in cultivation when he left the possession of the property. It was planted to cotton at the time. I was there in the valley on the night of April 17th and the morning of April 18, 1910, but I was not near my father's habitation on that night; I was at my own place. I suppose I was on my father's quarter-section between April 18th and May 18th; I did not see anyone else on the land or in possession of the land during that time other than my father.

CROSS EXAMINATION

I was with my father when he first came to this land in May, 1908. I did not know Mr. Edwards at that time, but became acquainted with him soon after. At the time we came there, Mr. Edwards lived about a half a mile east. My father established his

abode on the north side of the place, in the road, when he first came upon this land. It was, probably 200 feet from the northeast corner of the property and right along the north line. My father located about 25 feet south of the north line and about 200 feet west of Mr. Edwards' west line. The road that I have spoken of, extended east and west along the north line of the property in question.

25. It was thereupon stipulated by counsel for the respective parties that the value of the use of the lands here involved during the years from 1914 to 1920, inclusive, was the rental value as testified to by the witness, Robert L. Culpepper, who testified as follows:

I carried on farming operations in the neighborhood of the lands in question and I am familiar with the rental value of farm lands such as these occupied by Mr. Wells during the years 1914 and onward. I have rented lands from others in that neighborhood, and I know of other persons renting lands and the amount of rent they paid for the use of such land. I know of one piece right in section 12 that rented for \$10.00 and \$14.00, cash rent. The average cash rental value of such lands during the year 1914 was about \$10.00, gross. The net value would be about \$5.00.

During the year 1915, the net rental value of such lands would range about the same up until 1917. I would say the net rental value was about \$7.50 per acre, per year. Afterwards, 1915 and 1916, it would

be worth about \$7.50 an acre to the owner. In 1917, it went up and was worth \$12.50 an acre. For the year 1918, it ran up, and the net rental value was \$22.50 an acre. In the year 1919 it went up, and there was a lot of land that rented for \$50.00 cash, per acre, which, with \$7.50 off, would leave the net rental value at \$42.50. For the year 1920, the rental value was about the same as in 1919.

26. Plaintiff introduced in evidence the portion of the contest docket kept in the Los Angeles Land Office, containing entries of all proceedings relating to the contest application of Charles E. Wells against Patrick H. Bodkin, and wife, as heirs of Florence V. Bodkin, No. 2857, which entries were and are as follows:

022872

"TITLE OF CASE CONTEST NO 2857
Charles E. Wells vs Patrick H. Bodkin & Wife
as heirs of Florence V. Bodkin

Blythe, Cal.

Number and Kind of Entry	Date of Entry
022872 H. E.	Mar 6/14

DESCRIPTION OF LAND	SEC- TION.	TOWN- SHIP.	RANGE.	AREA
N. W. $\frac{1}{4}$	11	7S	22E	

DATE MINUTES OF PROCEEDINGS

Sept 22 1914 Application to contest filed.

Sept 22 1914 Rejected.

" Contestant notified by reg. mail.
Reg. receipt Oct 9/14.

Oct 28 1914 Appeal filed.

Oct 31 1914

Nov 1/14 All papers to G. L. O.”

27. Plaintiff thereupon rested his cause.

28. That thereupon defendant Patrick H. Bodkin was sworn on his own behalf and testified as follows:

DIRECT EXAMINATION.

My name is Patrick H. Bodkin, and I am one of the defendants named in this action. I am acquainted with the Northwest quarter of section 11, township 7 south, range 22 east, S. B. M, and have known that land since about the middle of January, 1908. I can't quite recall when I first met Mr. Wells, but it was somewhere about the middle of 1908. I moved into the valley in October, 1908, and met Mr. Wells soon after I moved in. Mr. Wells was there when I moved into the valley; he was living on the northeast quarter of this section in controversy. He continued to live there about two years. I meant to say that he was living on the northeast corner of this quarter-section,—not the northeast quarter. From there he simply moved his residence a short distance to the south from where he had been living on the same tract of land. At that time I lived about a mile away. I had occasion to observe what Mr. Wells did upon that land from 1908 to 1910. I used to drive through there quite often, going to Blythe. I think in 1908 he had cleared five or six acres in the

southeast corner of this quarter-section and had it in barley. He occasionally did quite a little bit of clearing—chopping down trees and burning brush. In 1908, when I first saw Mr. Wells' house it was located on the south side, south of the road 20 or 30 feet, I should say, judging by a subsequent survey of the Government, locating that road. The road was not located then. There was no county road there, laid out there, in 1908; it was not laid out properly until the Government survey of lines in 1917. Mr. Wells' house, I should say, to the best of my belief, was 15 or 20 feet south of the road, because we used to drive by on the north side, and I remember the distance between his house and the north line. In 1910, he built a new house south and east from where he had formerly lived.

I went on this tract of land on March the 25th, 1914. Mr. Wells was living upon the land at that time. After my filing, I just moved over. I lived across the road, and I moved over. Mr. Wells left the place under the force of my ejectment suit, filed in the Riverside Court some time, I think, in August, 1914. I have resided on the land ever since and my wife has resided there with me, and I have paid all the taxes that have ever been levied against the land since that time.

CROSS EXAMINATION.

Q Where is the road on the north line of section 11 located with reference to the line?

A The direct line as surveyed by the Government would move the fence about thirty or forty feet north of where it is now.

I know where the line on the north edge of section 11 is on the ground, and where it was in 1908.

Q Now, with reference to that line, where was the county road located nearby?

A There is no county road there.

Q Isn't there a road there now?

A There is a road there now, yes, sir, but it is not on the direct line.

Q Is there no county road?

A No sir; nobody has deeded any land along there to the county to make a county road.

Q Oh, I see. You are offering a conclusion. There is a road there, however?

A Yes sir.

There was a road there at the time Mr. Wells was living on the ground, it was a straight road. I don't know whether it had more than one set of wagon tracks on it, I don't think it did. It was just a blazed road through the brush, made principally by driving vehicles over it. It's width was about 30 feet. That country was covered more or less with brush and some shrub trees in 1908. Mr. Wells' first habitation was about 30 or 40 feet south of the wagon tracks making this road we speak of. Since Mr. Wells moved off that spot, the Government has laid out a road, but the road is not where the Government designated it should be. The road designated

was 60 feet wide, half on one side of the line and half on the other. The road is now being used by vehicles.

Q With reference to the spot where the wagon tracks were in 1908, where are the wagon tracks now being used?

A About the same place.

There is no evidence left of the old habitation first erected by Mr. Wells. Nearly all of the present road is off of this quarter-section that we are talking about. Mr. Wells' first habitation was about 30 feet south of the wagon track, of the road used at the time.

Q BY THE COURT: And where was the wagon track then with relation to the north line of the quarter-section?

A You mean the north line at that time, Judge?

Q Well, the north line hasn't been changed, has it?

A Yes sir.

Q The north line of the quarter-section?

A Yes sir, decidedly; by about 20 feet.

Q Well, then give it to us in both places; where was it then and where is it now?

A Well, then it was—What was your question?

Q Where was the road with relation to the north line of the quarter-section?

A It was somewhere near what was supposed to be the line of the quarter-section.

Q All right; and now where is it?

A It is 40 feet to the north.

Q That is, the line has been moved 40 feet to the north?

A Yes, sir, the line, by the Government.

Q BY MR. WILLIS: So that the spot then occupied by Mr. Wells is now 40 feet further removed from the actual north line than it was then?

A Yes, sir.

Q But the traveled road remains in the same spot?

A Yes, sir.

Q Was that line, as you say, moved 40 feet, the result of the recent survey by the Government?

A Yes, sir; 1917; the same survey which changed the description of this quarter-section to tract No. 78. In making that survey and laying the line, that located the north boundary line some 40 feet farther north than occupants and settlers theretofore had placed it. The survey shifted the whole section and adjacent sections 40 feet to the north.

29. Defendants introduced in evidence during the oral examination of Patrick H. Bodkin, tax receipts issued by the County Tax Collector of Riverside County, California, showing payment by defendant, Patrick H. Bodkin, of all taxes levied against the lands here involved since the same had been placed on the tax rolls of said county, and being for the fiscal years of 1918-19, and 1919-20, in full. And in connection therewith the following letter of C. R. Stebbins, County Tax Collector of Riverside County, California, dated March 24, 1920, addressed

to Dan V. Noland, attorney for defendants, was introduced in evidence, to-wit:

“Dear sir: The northwest quarter of section 11, township 7 south, range 22 east, was not placed upon the rolls of this county until the year 1918. It has been assessed the last two years to P. H. Bodkin, no other name appearing than his, and taxes have been paid, except the last installment of 1919. Yours truly, C. R. Stebbins, County Tax Collector. CRS/MH.”

30. Defendants thereupon introduced in evidence a certified copy of an amended complaint filed on October 3, 1918, in the Superior Court of the State of California, in and for the County of Riverside, entitled, “Charles E. Wells, plaintiff, ve. Patrick H. Bodkin and Arabella Bodkin, his wife, defendants”, No. 8364, for the purpose of showing that the possession and occupation of the lands by the defendants was recognized by the plaintiff to be adverse and hostile, he having commenced an action at that time endeavoring to recover possession of the property.

31. It was stipulated and agreed between counsel that after the issuance of final certificate to defendants in 1916, plaintiff, in August, 1917, commenced an action in the State Court at Riverside against defendants to establish a trust in, and to quiet title to, and for the recovery of possession of the lands here involved, and that on October 3, 1918, he filed the amended complaint in said action hereinabove mentioned, in which he sought to have it established and

declared that defendants held said certificate for a patent and said lands in trust for plaintiff and that recovery of possession be had; that said action was dismissed by plaintiff on February 13, 1920, prior to filing of the complaint herein.

32. F. F. Nelson, a witness called on behalf of the defendants, being duly affirmed, testified as follows:

DIRECT EXAMINATION.

My name is F. F. Nelson, and at present I reside in Beaumont. I have lived in the Blythe country. I went there March 13, 1902 and resided there until May 2d or 3d, 1913, excepting three summers that I went out to work three or four months each summer, during the years 1903, 1904 and 1905. I knew Mr. Bodkin and Mr. Wells in the valley. I first met Mr. Wells some time in May, 1908, either at my own place or—at either the south or east line of my quarter-section where we resided then. I had a conversation with Mr. Wells in regard to this northwest quarter of section 11, township 7 south, range 22 east. We had a number of conversations about it at various times. When he first came, I think he asked me where he could locate on a piece of land. I think just he and I were present, as nearly as I can remember, and I think it was the first time that I met Mr. Wells. We met either on my south line, in the road, or what we supposed was the road, or my east line. As near as I remember the conversation I had with Mr. Wells, it was something like this: He asked me

where there was any land that could be located. I told him I didn't know of any because the Reclamation had withdrawn the land—or the Government had withdrawn the land for the Reclamation Service; and he said, "Isn't there any land here that is delinquent?" I said, "Yes, there is probably some, but I don't believe you can do anything with it, because it is Government land, and it is withdrawn from the Reclamation Service—that is, by the Reclamation Service." I think that was our first conversation that we had about the land. I had several conversations with him at various times. It is so long since that I couldn't hardly locate it just where I was, nor what they were; but the gist of the business, as I understand it, would be that these lands were withdrawn and could not be entered, but Mr. Wells nevertheless went and located on the land.

Q Did Mr. Wells ever at any time say anything to you in regard to himself and the other persons out there commonly designated as squatters?

A Well, it was generally understood there that they were squatters, several of them. There was a number of them. And that was the understanding of all of us, that they were squatters there, and whether I spoke to Mr. Wells about him being a squatter or not, or he spoke to me,—it appears that he did, but I am not positive as to that. I think he spoke to me one time at the school house at an election we had there that he and several others were squatters on this land, and at that time they said they

were going to have the land, that they were going to get it, which I didn't believe they could, and Mr. Wells and I always had that same argument, that they would never acquire title to that land by virtue of settlement, and he argued one way and I argued the other. At that time, at the first meeting, he hadn't located in any particular place, as I remember. Subsequently he located on the north line of the northwest quarter of section 11, where he resided for some time; in fact, he was there when I left the valley. He did work on that land, considerable work there in 1908. And I don't remember what kind of a crop he raised in 1908, but I know he had some barley in in the spring of 1909. At the time I left the valley Mr. Wells was still residing in that same place.

CROSS EXAMINATION.

Q Now, you speak of these people being dubbed as "squatters" down there. Wasn't that term applied to them by those who were seeking and receiving preference rights by virtue of contests.

A No, I don't think that we ever—I can't tell you as to that now, but it was generally believed that they were squatters, by all of us that resided there at that time—Mr. Hickey and myself and Mr. Neighbours and Mr. Longworth and several others—that they were squatters on this land.

Q And you, on the other side, were what was called a preference-right man?

A No sir.

Q You sided with the preference-right people, though?

A I did because I thought they were right. Mr. Wells and I had a number of friendly arguments about it, and we talk about things yet, just as friendly as we did the first time we met. The preference-right people called Mr. Wells and his friends "squatters", I suppose. I couldn't tell you. It is so long since, I couldn't mention anyone who called them "squatters", but it was generally understood by all of us that they were. I did not have any preference right myself, and I did not contest anybody, I had my own entry, I filed on the land in 1902, and proved up on it, without contest.

REDIRECT EXAMINATION.

I know that the land in controversy had been claimed by someone else before Mr. Wells came there. Most of that land in that vicinity had been taken up before the Reclamation service—that is, before the United States had set it apart for the Reclamation service, and every one of those claims, as near as I can remember, had a little shack on it. Someone testified here that they were "stick-in-the-mud." And there was a little shack on the southwest corner of that quarter. The sticks were there, and nailed on, and when I came there, there was two pair of pants or overalls, I don't recollect now which, and a pair of shoes or two, and a coat hanging on this shack, and it remained there for, I think, a number of years, I can't just tell you when,

and then it disappeared all at once. I was there in 1902, and I filed on my homestead entry in 1902, and on a desert entry that corners with this land. This quarter-section in question was known as the Geiger claim. It cornered with mine. When I was testifying that some one else claimed the land, I referred to the Geiger claim. Geiger claimed the land. I understand all that land had been taken up years before by Geiger and had been canceled by the Government.

33. James E. Neighbours, a witness called on behalf of defendants, being duly sworn, testified as follows:

DIRECT EXAMINATION.

My name is James E. Neighbours. I live at San Jacinto. I lived in the Blythe country, having moved down there in 1904, and stayed there until 1908. I knew Mr. Bodkin in the valley and knew where he lived. I knew Mr. Wells, and am acquainted with the northwest quarter of section 11, township 7 South, range 22 east S.B.M. I first became acquainted with Mr. Wells in May, 1908. Prior to that time this quarter-section referred to had been known as the Geiger claim, and there was evidence of it having been occupied; there was a shack on the southwest corner of the quarter. When Mr. Wells came to that country, he located near the north line of the northeast corner of this northwest quarter. After he located there, he did some little clearing in 1908, and I think there was a little crop on one

corner in 1908. In 1909 there was probably about six acres of barley. I left in the fall of 1909 and returned in 1913. He was there in 1909, when I went out, and he was still near the same place in 1913 when I came back.

34. Thereupon the cause was submitted to the Court for consideration and thereafter, to-wit, on April 18, 1922, the Court filed its conclusions in words and figures, to-wit:

“E-51 EQUITY.

Henry M. Willis, Esq., of Los Angeles, California, Attorney for plaintiff.

Dan V. Noland, Esq. of Los Angeles, California, Attorney for defendants.

MEMORANDUM OPINION

Bledsoe, District Judge:- In this case, after having been given very careful consideration to the facts involved and the contentions advanced, I am persuaded that the bill of plaintiff should be dismissed. Upon the facts, the case is essentially dissimilar from that of *Edwards v. Bodkin* (249 Fed. 562: 265 Fed. 621) heretofore tried in this court and referred to frequently in the argument. In the *Edwards* case, *Edwards* himself was the original entryman and the preference right sought to be relied upon as a defense to his suit was a right granted to the defendant therein arising out of a contest of *Edwards'* entry initiated by the defendant. The Circuit Court of Appeals in considering the case held

that a mistake of law had been made in sustaining Bodkin's contest and in addition, that the preference right upon which Bodkin relied had not actually been made use of by him in that the land secured and with respect to which the controversy was waged was obtained through the employment of scrip, etc.

Herein, the original locator, one Geiger, is not before the Court and the correctness of the ruling of the Department of the Interior with respect to Florence V. Bodkin's contest of his entry is conceded. The patent relied upon and which it is the object of the suit to nullify was obtained solely through the use of the preference right accorded to Florence V. Bodkin in virtue of her successful contest. The case, therefore, in my judgment, is ruled in all its substantial aspects by the decision of the Supreme Court of California in *McLaren v. Fleischer*, 181 Cal. 607, affirmed on appeal by the Supreme Court of the United States. (U. S. Adv. Ops. 1920-21, p. 674.)

Plaintiff seeks to differentiate the cause herein from the *McLaren* case by insisting that a mistake of law was indulged in by the Department of the Interior in ruling favorably to defendants herein upon an *ex parte* application with respect to a charge of threats and intimidation, etc., asserting to have been employed by plaintiff Wells against the entryman Florence V. Bodkin and that Florence V. Bodkin's death, previous to the consummation of her entry of the land in pursuance of the preferential

right accorded to her, served to invalidate such preference right in so far as her father and mother were concerned, and that in consequence there could be no inheritance by them or either of them of the right thus granted to her. I am persuaded, however, that the ruling of the Department to the effect that such a right was inheritable by the heirs of the entryman, pursuant to the terms of the Act of July 26, 1892, was a reasonable construction of that Act, and I am also persuaded that the defendants were permitted to consummate the entry of their deceased daughter, not because of any alleged threats or intimidations employed against her by plaintiff, but because of the fact that the defendants had rightfully inherited the right to consummate the entry of their deceased daughter and that to allow such entry to proceed to patent, was but the lawful recognition of a valid right inuring to the heirs and in no wise dependent upon the employment of any asserted threats of intimidation. In other words there was no occasion to pass upon the question as to whether threats or intimidation had been employed and therefore this question was not passed upon by the Department and therefore there was no mistake of law committed as asserted by the plaintiff.

For these reasons a decree in the usual form will be entered, dismissing the bill of complaint.

April 18, 1922."

35. Thereafter, to-wit, on May 5, 1922, and in pursuance of said conclusions, the Court entered its

Decree in favor of the defendants and against the plaintiff, dismissing the cause, which decree was filed with the Clerk of said Court and duly entered on May 5, 1922, and is in words and figures as follows:

“No. E.-51 Equity

D E C R E E

On the 14th day of February, 1921, the above entitled cause was submitted to the Court, and the Court being duly advised in the premises, thereafter, on the 18th day of April, 1922, handed down its opinion, and, on its own motion, and in accordance with said opinion, ordered that a Decree of Dismissal accordingly be entered herein:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the above entitled cause be and the same is dismissed.

Dated this 5th day

of May, A. D. 1922.

Benjamin F. Bledsoe,

U. S. District Judge.

Decree entered and recorded May 5, 1922.

Chas. N. Williams, Clerk.

By Douglas Van Dyke, Deputy Clerk.”

36. Thereafter, to-wit, on the 31st day of July, 1922, plaintiff filed his petition for appeal and assignments of error, which are in words and figures as follows:

“E-51 Equity

PETITION FOR APPEAL

To the Honorable Benjamin F. Bledsoe, District Judge:

The above named Charles E. Wells feeling aggrieved by the decree entered in the above entitled cause on the 5th day of May, 1922, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the Assignment of errors filed herewith, and he prays that his appeal be allowed and that a citation be issued as provided by law, and that a transcript of the record proceedings and document upon which said decree was issued, duly authenticated, be sent to the United States Circuit Court, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of him be made.

Henry M. Willis
Attorney for Petitioner.”

“E-51 Equity

Assignment of Errors.

Now comes the plaintiff in the above entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above entitled cause, from the decree made by this honorable court on the 5th day of May, 1922.

That the United States District Court for the Southern District of California, Southern Division, erred in the following particulars, to wit:

1. The Court erred in not holding that the officers of the Land Department made a mistake of law in deciding that a preference right of entry became vested in Florence V. Bodkin as a result of the successful termination of her contest of the Geiger entry at a time when the lands involved were withdrawn from all forms of entry under the Reclamation Act.

2. The Court erred in not holding that no right, either preferential or otherwise, to enter upon any public lands, could be lawfully acquired while such public lands were withdrawn from all forms of entry under the Reclamation Act.

3. The Court erred in not holding that the officers of the Land Department made a mistake of law when, on January 3, 1914, on the application of defendants, and without a hearing or trial, they directed that defendant, Patrick H. Bodkin, as father of the deceased Florence V. Bodkin, be allowed thirty days to elect whether he would relinquish his then homestead entry upon other lands, and make, with his wife, the defendant Arabella Bodkin, as his co-heir, a homestead entry upon the land, based on the application of Florence V. Bodkin, and directed that in the event of his doing so, the homestead entry of plaintiff should be canceled.

4. The Court erred in not holding that the regulations of the Secretary of the Interior of January 19, 1909, vacated and annulled any right that may theretofore have come to Florence V. Bodkin by reason of her contest of the Geiger entry, and its

cancellation on July 1, 1908, and notice thereof on the same date to said Florence V. Bodkin.

5. The Court erred in not holding that the officers of the land department made a mistake of law, when, on May 2, 1914, they canceled the homestead entry of plaintiff, theretofore allowed on October 14, 1913, and permitted the defendants herein, as heirs of Florence V. Bodkin to make a homestead entry on the land.

6. The Court erred in not holding that whatever preference right the said Florence V. Bodkin had acquired by virtue of her contest of the Geiger entry had been used and exhausted by her homestead application of May 18, 1910, and was not thereafter inheritable.

7. The Court erred in not holding that the defendants were incompetent to inherit the homestead rights of said Florence V. Bodkin, at her death on March 25, 1912, by reason of said heirs being then and there homestead entrymen on other lands under the homestead laws of the United States.

8. The Court erred in not holding that plaintiff had acquired a settler's right by reason of his settlement on the land on April 18, 1910, followed by the filing of his homestead application thereon on May 18, 1910, and that his settler's right so perfected was superior to any claims of said Florence V. Bodkin by virtue of her homestead application of May 18, 1910.

9. The Court erred in not holding that the application of Florence V. Bodkin exhausted whatever

preference right of entry she may have had at the date of such application, and that such application, not having been perfected by settlement and residence at the time of her death, did not descend to her heirs, and was not inheritable.

10. The Court erred in not holding that the defendants were incompetent to inherit from their daughter, Florence V. Bodkin, at her death, any rights to make or consummate any homestead entry on public lands.

11. The Court erred in holding that defendants inherited the right to consummate the entry of said Florence V. Bodkin.

12. The Court erred in holding that a right to consummate said entry of Florence V. Bodkin, and to press it on to a patent, inured to the heirs of Florence V. Bodkin, defendants herein, notwithstanding they had already used and exhausted their homestead rights at the time of her death.

13. The Court erred in not granting to plaintiff the relief prayed for in his complaint.

14. The Court erred in dismissing the complaint of plaintiff.

Wherefore appellant prays that said decree be reversed and that said District Court for the Southern District of California, Southern Division, be ordered to enter a decree reversing the decision of the lower court in said cause.

Henry M. Willis
Attorney for Appellant."

“E-51 Equity

ORDER ALLOWING APPEAL.

Upon motion of Henry M. Willis, solicitor and counsel for complainant, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibit, stipulations and all stipulations and proceedings be forthwith transmitted to the said United States Circuit Court of Appeals. It is further ordered that the bond on appeal be fixed at the sum of \$250.00

Dated July 31, 1922.

BLEDSON
JUDGE.”

“E-51 EQUITY.

CITATION ON APPEAL.

UNITED STATES OF AMERICA—SS.

To Patrick H. Bodkin, and Arabella Bodkin, his wife: Greeting:

You are hereby cited and admonished to be and appear at the session of the United States Circuit Court of Appeals of the Ninth Circuit, in the City of San Francisco, in the State of California, on the 6th day of September 1922, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the District Court of the United States for the Southern District of California, Southern Division, from a final decree signed, filed and entered

on the 5th day of May, 1922, in that certain suit, being in equity No. E.—51, wherein Charles E. Wells is plaintiff and appellant and you are defendants and appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing the appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

Witness the Honorable Erskine M. Ross, Judge of the United States Circuit Court for the Ninth Circuit, this 7th day of August, 1922, and of the Independence of the United States 146.

Ross.

U. S. Circuit Judge for
the Ninth Circuit.

“E—51 EQUITY.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, Charles E. Wells, as principal and R. L. Culpepper, by occupation rancher, residing at Riverside County, in the Southern District of California, and W. B. Edwards by occupation rancher, residing at Riverside County in the Southern District of California, as sureties, are held and firmly bound unto Patrick H. Bodkin and Arabella Bodkin, his wife, in the sum of Two Hundred Fifty (\$250.00)

Dollars, lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment, will and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators by these presents.

Sealed with our seals and dated this 4th day of August, 1922.

Whereas the above named Charles E. Wells has petitioned for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of the District Court of the United States for the Southern District of California, Southern Division, in the above entitled cause:

Now therefore, the condition of this obligation is such that if the above named Charles E. Wells shall prosecute his said appeal to effect and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

Charles E. Wells.
R. L. Culpepper.
W. B. Edwards.

STATE OF CALIFORNIA)
COUNTY OF RIVERSIDE)ss.

On this 4th day of August, 1922, personally appeared before me R. L. Culpepper, and W. B. Edwards, respectively known to me to be persons described in and who duly executed the foregoing in-

strument, as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth.

And the said R. L. Culpepper, and W. B. Edwards being respectively by me duly sworn, says, each for himself and not for the other, that he is a resident and householder of the said county of Riverside, in the Southern District of California, and that he is worth the sum of \$500.00 over and above his just debts and legal liability and property exempt from execution.

R. L. Culpepper.

W. B. Edwards.

Subscribed and sworn to before me this 4th day of August 1922.

Dean Edgerton

[Notarial
Seal]

Notary Public in and for the
County of Riverside, State of
California.

The within bond is approved both as to sufficiency and form this 7th day of August, 1922.

Ross

Circuit Judge.

37 Thereafter the court made an order extending time for printing and filing Transcript on Appeal in words and figures as follows, towit:

“IN THE DISTRICT COURT OF THE UNITED
STATES, SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN DIVISION.

CHARLES E. WELLS,)
 Plaintiff,)
 vs)
PATRICK H. BODKIN, and)
ARABELLA BODKIN, his wife,))
 Defendants.)
E. 51-Equity

ORDER EXTENDING TIME FOR FILING
TRANSCRIPT ON APPEAL.

It appearing to the court that there is good cause
therefor:

IT IS HEREBY ORDERED that plaintiff and
appellant in the above entitled cause be, and he is
hereby granted to and including the 5th day of Octo-
ber 1922, in which to complete, cause to be printed
and filed, the transcript on appeal in the above en-
titled action.

Dated this 30th day of August, 1922.

ROSS
Circuit Judge

Approved as to form
as per Rule 45.

DAN V. NOLAND,
Attorney for Defendants.”

IN THE DISTRICT COURT OF THE UNITED
STATES SOUTHERN DISTRICT OF
CALIFORNIA SOUTHERN
DIVISION.

CHARLES E. WELLS,)
 Plaintiff,)
 vs)
PATRICK H. BODKIN, and)
ARABELLA BODKIN, his wife,))
 Defendants.)
E. 51-Equity

ORDER EXTENDING TIME FOR FILING
TRANSCRIPT ON APPEAL.

It appearing to the court that there is good cause therefor:

IT IS HEREBY ORDERED that plaintiff and appellant in the above entitled cause be, and he is hereby granted to and including the 31st day of October 1922, in which to complete, cause to be printed and filed, the transcript on appeal in the above entitled action.

Dated this 25th day of September, 1922.

BLED SOE
Judge.

Approved as to form
as per Rule 45.

DAN V. NOLAND
Attorney for Defendants.

It is stipulated between attorneys for plaintiff and defendants that the foregoing is a true and correct statement on appeal, and contains all the records necessary for complete determination of the issues involved in this cause; and that the same may be used as a true and correct statement on appeal in pursuance of Rule No. 77.

HENRY M. WILLIS

Attorney for Plaintiff.

H. F. BRIDGES and

DAN V. NOLAND

Attorneys for Defendants.

Approved and allowed as a stipulated statement of the case on appeal, this 25th day of September, 1922.

BLED SOE

District Judge.

(Endorsed): E-51 Equity. IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION. CHARLES E. WELLS, Plaintiff, VS PATRICK H. BODKIN, and ARABELLA BODKIN, his wife, DEFENDANTS. AGREED STATEMENT ON APPEAL. FILED Sep. 25 1922, CHAS. N. WILLIAMS, Clerk. By L. J. CORDES Deputy Clerk, HENRY M. WILLIS, SUITE 511 CITIZENS NATIONAL BANK BLDG., LOS ANGELES, CAL. Attorney for Plaintiff.

(SOUTHERN DIVISION)

IN TESTIMONY WHEREOF, I have hereunto
set my hand and affixed the Seal of the
District Court of the United States of
America, in and for the Southern District

(SEAL) of California, Southern Division, this
.....25 day ofOctober.....
in the year of our Lord One Thousand
Nine Hundred and Twenty-two, and of our
Independence the One Hundred and
Forty-seventh.

CHARLES N. WILLIAMS,

Clerk of the District Court of the
United States of America, in and for
the Southern District of California.

ByR. J. Zimmerman.....
Deputy.

(Seal)

100-24724

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Charles E. Wells,

Appellant.

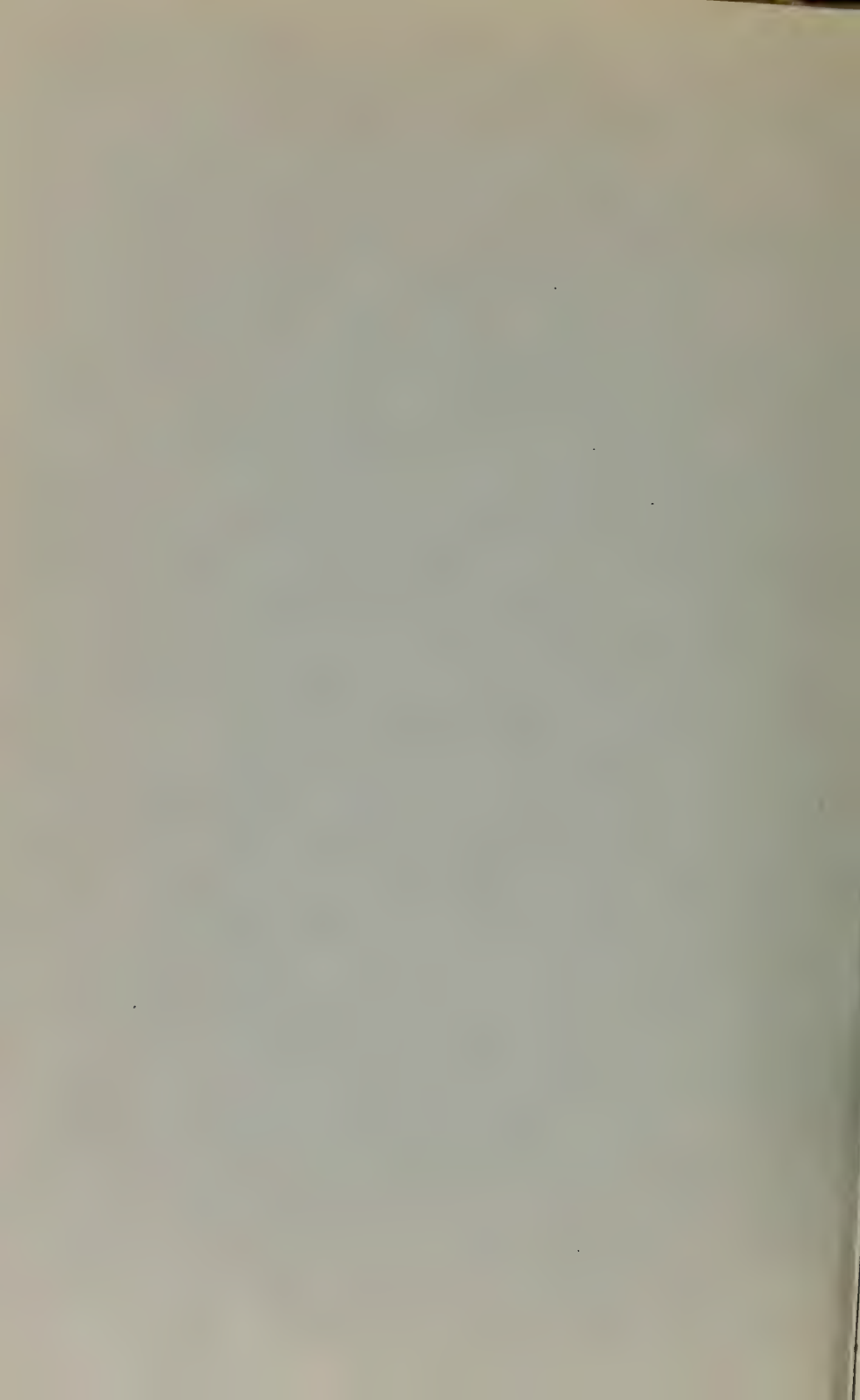
vs.

Patrick H. Bodkin and Arabella
Bodkin,

Appellees.

BRIEF FOR APPELLANT.

HENRY M. WILLIS,
Attorney for Appellant.



IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Charles E. Wells,

Appellant.

vs.

Patrick H. Bodkin and Arabella
Bodkin,

Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

Appellant brought this action in equity against the appellees, praying for a decree declaring that the defendants, appellees herein, hold the title to a certain quarter section of former public land in trust for this appellant and that the defendants be required to make a good and sufficient conveyance of said lands and the title thereof to the plaintiff and for the reasonable value of the use of said lands.

In his complaint appellant alleges in substance that he is and at all times mentioned herein, has been duly

qualified under the laws of the United States to make and perfect a homestead entry on public lands of the United States; that on May 18, 1903, the northwest quarter of section 11, township 7 south, range 22 east, S. B. M. situated in the county of Riverside, California, was open to entry under the land laws of the United States, and that on that date one Jacob H. Gieger duly made his homestead entry thereon; that on September 8, 1903, said lands together with others in the neighborhood thereof, were withdrawn by order of the land department under a first form withdrawal, from all forms of disposal under the provisions of the so-called Reclamation Act approved June 17, 1902; that while said lands were so withdrawn, one Florence V. Bodkin, an unmarried daughter of the appellees herein, filed a contest against the homestead entry of said Gieger, and thereafter on July 1st, 1908, upon the filing of a relinquishment of his entry by the said Geiger, the Commissioner of the General Land Office canceled the Geiger entry and at the same time notified Florence V. Bodkin that she had been awarded a preference right to enter such quarter section within thirty days after the same had been restored to public entry; that on January 10, 1910, the Secretary of the Interior duly made an order restoring such quarter section together with others in the neighborhood thereof to public settlement on April 18, 1910, and to public entry on May 18, 1910; that on April 18, 1910, appellant made actual settlement on the quarter section involved herein with the intention of making home-

stead application therefor and with his family resided on said quarter section until May 18, 1910, when he filed his homestead application as such settler for the land and paid the required fees, and thereafter continued to reside on the land and to improve the same, with his family, until dispossessed by appellees by a judgment of the Superior Court of the State of California in and for Riverside County, entered August 6, 1914; that on May 18, 1910, Florence V. Bodkin also filed her homestead application for the same land, claiming a preference right so to do under and by virtue of the alleged preference right awarded her by the land department upon the cancellation of the Geiger entry, following his relinquishment; that all such applications were suspended for reasons herein immaterial, until May 22, 1912, when said lands were again restored to public entry but subject to the entries already made thereon; that on March 25, 1912, said Florence V. Bodkin died leaving surviving as her heirs at law her father and mother, the appellees herein; that on June 3, 1912, the local land officers at Los Angeles, California, rejected the homestead application of appellant and notwithstanding the death of Florence V. Bodkin, allowed her homestead application on the ground that she had acquired a preference right under the laws of the United States by reason of the successful termination of her contest of the Geiger entry; that appellant appealed to the Commissioner of the General Land Office from such order of rejection and on November 15, 1922, Commissioner

affirmed the order of rejection; that appellant appealed to the Secretary of the Interior, who, on May 27, 1913, reversed the order of rejection and ordered the entry of Florence V. Bodkin canceled, and directed the allowance of appellant's entry for the reason that Florence V. Bodkin had died prior to the allowance of her entry, and that such application to enter did not descend to her heirs; that a rehearing of said matter was had by the Secretary and on August 29, 1913, the Secretary canceled the entry of Florence V. Bodkin and allowed that of appellant for the stated reason that Florence V. Bodkin had died prior to the allowance of her entry and that her heirs, appellees herein, having already used and exhausted their homestead rights, could not inherit the rights of said Florence V. Bodkin; that on September 18, 1913, the homestead application of Florence V. Bodkin was canceled and on October 14, 1913, the homestead application of appellant was duly allowed; that thereafter on the application of appellees herein as heirs of the said Florence V. Bodkin, deceased, the officers of the land department, without notice or hearing or evidence, and arbitrarily, on January 3, 1914, directed the local land officers to allow Patrick H. Bodkin, as father of said Florence V. Bodkin, thirty days to elect whether he would relinquish his then homestead entry upon other lands and make, with his wife Arabella Bodkin as co-heir, a homestead entry upon the lands herein involved, based on the application of Florence V. Bodkin, and that in the event of his so doing, the home-

stead entry of appellant on said lands should be canceled; that such notice was given and thereafter on March 6, 1914, said Patrick H. Bodkin filed his relinquishment in writing of a former homestead entry made by him on other lands, and thereupon, to-wit, on May 2, 1914, the officers of the land department canceled the homestead entry of appellant and allowed that of appellees as heirs at law of Florence V. Bodkin, deceased, upon the stated ground that said Florence V. Bodkin had acquired a preference right to enter said lands within thirty days after said lands had been restored to public entry by reason of her successful contest of the Geiger entry, and that said preference right descended to appellees as her heirs; that thereafter appellant adopted, used and exhausted all remedies provided by the laws of the United States and the rules and regulations of the land department concerning appeals and the exercise of supervisory authority, in order to secure his right as a settler and homestead entryman on said lands, but that the officers of the land department refused to allow him the right and allowed that of the appellees herein and thereafter caused patent to be issued to the said appellees as heirs at law of the said Florence V. Bodkin, which patent was issued October 23, 1919, and delivered Janaury 6, 1920.

In his complaint appellant further alleges that the officers of the land department committed mistakes of law in considering and acting upon the contest of Florence V. Bodkin against the Geiger entry and in

cancelling the homestead entry of appellant on May 2, 1914, after it had been duly allowed, and in deciding against appellant on his claim of right to make the homestead entry by virtue of his settlement on the land; and in denying appellant's right as a settler on the land to make such homestead entry, and in recognizing and deciding that Florence V. Bodkin had acquired a preference right to make homestead entry on the land by virtue of the successful termination of her contest of the Geiger entry, and that by reason of such mistakes of law, the appellant has been denied his rights to a patent for the land, and a patent therein has been issued to the appellees herein. Appellant further alleges that he had in fact complied with all the laws and requirements of the United States and all the rules and regulations of the land department relating to homesteads and to the residence thereon and cultivation and improvement thereof, with the exception only of the making and filing of final proof of completion and compliance, until he was ejected from the premises by judgment of the state court, as hereinbefore mentioned, in August, 1914.

In their answer the appellees admit all the averments of the complaint relating to the proceedings in the land department, but deny that the quarter section embraced by the Geiger entry was withdrawn under the first form withdrawal order, and on the contrary allege that such withdrawal order did not take effect on such land until the cancellation of the Geiger entry in the Bodkin contest; they deny that appellant

made actual settlement on the land in question on April 18, 1910, and allege on the contrary that appellant was a trespasser upon and unlawfully in possession of said tract of land for nearly two years prior to such date, and further allege that appellant was a "sooner" and trespasser in unlawful occupation of said land on April 18, 1910; appellees also deny that the application filed by said Florence V. Bodkin was an entry and deny that her application was subsequent to any entry of appellant; they deny that the order of January 3, 1914, wherein appellees were allowed thirty days to elect whether they would relinquish their then homestead and make application as heirs at law of Florence V. Bodkin to homestead the land in question, was made without notice or without hearing or evidence or arbitrarily; they deny that appellant used and exhausted all the remedies provided by law and the rules of the land department to secure his rights and to correct the mistakes claimed; they deny the allegations of the mistakes of law set forth in paragraphs 15 to 19 of the appellant's complaint; they deny that appellant has complied with the homestead law so as to entitle him to a patent.

Appellees make further and extensive answer, in which the same and other proceedings of the land department relating to this case are set forth, and also in their answer and more fully by the amendment to the answer, pleaded title by prescription and certain statutes of limitation of California.

Upon these pleadings the cause went to trial in the District Court and all of the allegations of the complaint setting forth the departmental history and records of the conflicting applications, were fully sustained by the evidence, and certain oral testimony was given on the question of settlement by appellant on the land in question and on the subject of compliance with the homestead laws, and as to the value of the use and occupation thereof from the date of issuance of the patent to appellees.

The Evidence and Proofs in the Record.

The evidence introduced shows that on July 17, 1902, a second form withdrawal of the land in question was made by the Secretary of the Interior [record p. 39]; that on May 18, 1903, Geiger filed his homestead application for the land in question subject to a second form withdrawal; that on September 12, 1903, the Secretary of the Interior withdrew the land in question from all forms of disposal whatever under the first form of withdrawal under the Reclamation Act [record p. 40]; that on January 30, 1908, Florence V. Bodkin filed a contest affidavit against the Geiger entry and that on March 13, 1908, such contest was withdrawn by the contestant and on the same day Geiger's relinquishment of the entry was filed and that the contestant paid the \$1.00 cancellation fee and was notified that she was given a preference right of entry to be exercised within thirty days after the land was open for entry [record pp. 41-43]; that the

lands were thereafter duly opened to settlement on April 18, 1910, and to entry on May 18, 1910.

That on April 18, 1910, appellant made actual settlement on the land in question and established his residence thereon with his family on that date, and thereafter resided thereon and cleared some seventy or eighty acres, and cultivated sixty acres, purchased sixty shares of water stock for the same and raised crops of grain and cotton thereon, and remained in actual residence thereon until September 15, 1914, when he was forced off the land by appellees [record pp. 77-89].

That on May 18, 1910, appellant filed his homestead application to enter the land in question, alleging therein that he had made actual residence on said land and was an actual settler thereon [record pp. 43-44]; that on May 18, 1910, Florence V. Bodkin also filed her homestead application and paid the fees therefor under her claim of preference right; that both such applications were suspended on May 18, 1910, pending a hearing as to the character of the land, and that thereafter on May 24, 1912, the application of appellant was rejected because of the homestead application of Florence V. Bodkin for the same lands filed May 18, 1910, under the preference right in the case of Bodkin v. Geiger [record p. 45]; that on June 3, 1912, notice of such rejection was given to appellant in writing [record p. 48]; that appellant duly appealed to the Commissioner of the General Land Office from such rejection and on November 15,

1912, the Commissioner affirmed the rejection, holding that Florence V. Bodkin had acquired a preference right to enter such lands by virtue of the successful termination of her contest of the Geiger entry, and that her application was in all respects regular and in the exercise of such preference right [record pp. 49-52].

That appellant appealed to the Secretary of the Interior where it became known to the department that Florence V. Bodkin had died on March 25, 1912, prior to the allowance of her entry which was made on June 1, 1912, and on such appeal the Secretary canceled the Bodkin entry and ordered the allowance of the Wells application in the event that he make proper showing of present qualifications to make homestead entry for the tract, basing such decision on the proposition that the application of Florence V. Bodkin to make homestead entry did not descend to her heirs, and that there was no authority of law for the allowance of entry in such case in the name of a deceased applicant [record pp. 52-53]. Thereafter appellees, as heirs of Florence V. Bodkin, made a motion for rehearing of the last mentioned decision and on August 29, 1913, the Secretary denied such motion for the reason that it was made to appear that Bodkin, appellee, one of the heirs of the deceased applicant, had made other homestead entry in his own right, which precluded him and his wife as heirs of this daughter from perfecting the application filed by her; and in such decision directed that the entry of Florence V.

Bodkin be canceled and that the application of Wells should be allowed [record pp. 54-60].

That appellees thereafter petitioned the Secretary of the Interior for the exercise of his supervisory authority, and on January 3, 1914, the Secretary decided that the filing of the application of Florence V. Bodkin under her preference right determined her heirs' rights in the premises so far as the form of entry under such preference right is concerned, and that no substitution for her homestead application of some other form of entry or purchase after the thirty days' period could have been made by her or by her heirs so as to preserve such preference right to extend the same beyond thirty days; but the appellees as heirs at law were held to have the technical right to perfect the deceased daughter's application by making entry on the land, notwithstanding the homestead entry made by her father one of said heirs; that the fact of the father having made such homestead entry in his own right does not preclude his election to make and perfect homestead entry as co-heir with his wife based upon the application of his daughter, notwithstanding his present entry or Wells' appearance in the case. In such decision the appellee Bodkin was allowed thirty days to elect whether he would relinquish his present homestead entry and make, with his wife as co-heir, homestead entry based on his daughter's application [record pp. 60-63].

That on January 26, 1914, the appellee Bodkin was given notice in writing of such decision [record pp.

64-65] and he thereafter, on March 6, 1914, relinquished his homestead entry on other lands and as one of the heirs and for the heirs of Florence V. Bodkin, deceased, filed his application for homestead entry on the land in question on March 6, 1914, and attached thereto his affidavit stating that he made such application pursuant to the decision of the land department and as heir of said Florence V. Bodkin and based on her application filed May 18, 1910. [Record pp. 67-70.]

That thereafter on May 2, 1914, the Commissioner of the land office canceled the former homestead entry of Bodkin, appellee, on his relinquishment of March 6, 1914, and also canceled the entry of appellant [record pp. 70-71]. Thereafter on September 22, 1914, appellant filed his application to contest the homestead entry of appellee Bodkin, charging fraud and perjury [record pp. 72-74]. That on the same day the local land officers rejected such application to contest on the ground that the allegations of contest did not state facts sufficient to constitute a cause of action, and gave notice of such rejection to appellant who, on October 28, 1914, filed in the local land office his notice of appeal therefrom to the Commissioner [record pp. 75-76]; that on November 1, 1914, the local land officers transmitted to the Commissioner such application to contest and notice of appeal [record pp. 76-77]; that no hearing or decision of said appeal has ever been had. [Record p. 97.]

Upon such record evidence and the testimony of the witnesses given at the trial, the cause was submitted and thereafter on May 5, 1922, the court entered its decree dismissing the cause, at the same time filing a memorandum opinion, wherein the Honorable District Judge in substance, held that the officers of the department ruled correctly with respect to the Bodkin contest of the Geiger entry, that the patent relied upon was granted solely through the use of the preference right accorded to Florence V. Bodkin in virtue of her successful contest, and therefore this case is ruled in all its substantial aspects by the decision of the Supreme Court of California in McLaren v. Fleisher (181 Cal. 607), affirmed on appeal by the Supreme Court of the United States; and that the ruling of the department to the effect that the preference right awarded to Florence V. Bodkin in her contest was inheritable by the heirs of the entryman, pursuant to the terms of the Act of July 26, 1892, and was a reasonable construction of that Act, and that the appellees herein had rightfully inherited the right to consummate the entry of their deceased daughter, and that to allow such entry to proceed to patent was but the lawful recognition of a valid right inuring to the heirs, and for these reasons the usual form of decree of dismissal of the complaint was ordered entered. [Record pp. 109-111.]

From such decree Wells has appealed and filed his assignment of errors [record pp. 103-116], and on the record filed herein prays for a reversal of the decree dismissing his cause.

Specifications of Error.

While appellant relies upon each and every of his specifications of error as made and filed with his petition for appeal, the same naturally arrange themselves and fall into general groups embracing a single subject, and may be restated for the purpose of this brief as follows:

1. The decree is erroneous in that it decides that the officers of the land department did not make a mistake of law in holding that a preference right of entry became vested in Florence V. Bodkin as a result of the successful termination of her contest of the Geiger entry, following his relinquishment, while the land embraced in his entry was withdrawn from all forms of disposal under the Reclamation Act; and in holding that a preference right could be so lawfully acquired as a result of a successful contest of an entry on lands so withdrawn.

2. That the decree is erroneous in that it decides that the officers of the land department did not make a mistake of law in holding that the appellees herein, as heirs at law of Florence V. Bodkin, succeeded to and inherited the right of their deceased daughter to consummate her entry as evidenced and determined by her application of May 18, 1910, and in holding that such preference right was not terminated or exhausted by her application, but survived and descended to her heirs.

3. That the decree is erroneous in that it decides that the officers of the land department did not make a mistake of law in holding that the appellees, as heirs at law of Florence V. Bodkin, were competent to inherit her preference right of entry even after she had exercised such right by filing her application based thereon, notwithstanding at the time of her death and during all this conflict, the appellee Bodkin was holding a homestead in his own right.

4. That the decree is erroneous in that it decides that the officers of the land department did not make a mistake of law in canceling appellant's entry, which had been allowed on October 14, 1913, and allowing that of appellees made on March 6, 1914, as heirs of Florence V. Bodkin, without notice, hearing or evidence.

5. That the decree is erroneous in that it decides that the officers of the land department did not make a mistake of law in holding that the regulations of January 19, 1909, did not terminate any right that may theretofore have come to Florence V. Bodkin by reason of her contest of the Geiger entry and its relinquishment and cancellation.

POINTS STATED.

First Point: Appellant claims that upon the withdrawal of lands from all forms of disposal under a first form withdrawal under the Reclamation Act, all the land laws, other than the Reclamation Act,

are suspended, and in effect repealed, insofar as such withdrawn land is concerned, and that no right in, or claim to such land may be initiated during such withdrawal; that the law authorizing a contest of public land entries along with the law providing for a preference right flowing to the successful contestant in such a contest, are among the land laws so suspended, and therefore no contest of an entry embraced in a first form withdrawal under the Reclamation Act, can lawfully be maintained so as to initiate the preference right created by the Act of May 14, 1880. In short, that such a contest, being in its very nature the initiation of a claim to the land, is without authority of law, and therefore no preference right as defined by the Act of May 14, 1880, can lawfully flow therefrom.

Second Point: On the assumption that a preference right became vested in Florence V. Bodkin upon the termination of her contest of the Geiger entry by securing his relinquishment, appellant claims that such preference right was exhausted—used up and became *functus officio*—by the filing of her homestead application, based on such preference right, within the thirty days after the land in question was restored to entry. That such preference right was extinguished by such homestead entry just as certainly as it would have been extinguished if she had not exercised the same within the thirty day period of limitation. That being so extinguished and merged in the homestead application, and the applicant having died before allow-

ance of her entry, all rights thereunder died with her, it being conceded that an application to enter does not descend to heirs of the applicant. That a used preference right is not inheritable.

Third Point: That whatever right may have accrued to Florence V. Bodkin from the cancellation of the Geiger entry under her contest on July 1, 1908, was terminated by the regulations of January 19, 1909, promulgated long before her application to enter thereunder was filed.

Fourth Point: That the officers of the land department erred in matter of law in canceling appellant's homestead entry after it had been allowed, without a hearing or trial, and solely upon the petition of appellees alleging that their daughter had been prevented from settling upon the land embraced in her homestead application by threats and intimidation of appellant, and in arbitrarily deciding that appellant should not be allowed to profit by his wrong in so preventing settlement, and in arbitrarily granting to appellee, Bodkin, the right to elect whether he would relinquish his present homestead entry and make with his wife as co-heir, homestead entry on the appellant's land, based on the deceased daughter's application; and in canceling appellant's entry upon the filing of such relinquishment and a new homestead application by appellees, as heirs of the deceased applicant.

ARGUMENT.

First Point.

In support of appellant's claims asserted under the first point, we call the court's attention to the laws and land regulations relating to contests and to departmental and judicial construction of the effect of a Reclamation Act first form withdrawal thereon.

Section 2297 of the Revised Statutes is the sole source of legal authority for contesting a public land entry. It is as follows:

"If at any time after the filing of an affidavit as required by section 2290, and before the expiration of the five years mentioned in section 2291, it is proved, after due notice to the settler to the satisfaction of the register of the land office, that the person having filed such affidavit, has actually changed his residence or abandoned the land for more than six months at any time, then and in that event, the land so entered shall revert to the government, etc."

By section 2 of the Act of May 14, 1880 (21 Stat. 140), Congress created a preference right to flow from such a contest as follows:

"In all cases wherein a person has contested, paid the land office fees and procured the cancellation of any preemption, homestead or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter such lands."

Section 3 of the Reclamation Act (32 Stat. 388), provides as follows:

“That the Secretary of the Interior shall, before giving the public notice provided for in section 4 of this act, withdraw from public entry lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purpose of the act: the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works, etc.”

By common acceptance and usage the withdrawal from public entry for *irrigation works* is called a withdrawal of the first form, and that of lands believed to be *susceptible of irrigation from said works* is a withdrawal of the second form.

That a withdrawal of lands under the first form is legislative in its nature and effect was held by the secretary in the case of John J. Manny (35 L. D. 250) wherein he stated:

“Such withdrawals (for irrigation works under the reclamation act) have the force of legislative withdrawals, and are therefore effective to withdraw all lands within the designated limits to which right has not vested.”

He had previously made the same declaration in his instructions of January 13, 1904 (32 L. D. 387).

The order withdrawing the lands in question herein provides for the withdrawal "from all forms of disposal whatever under the first form of withdrawal authorized by section 3 of the Act of June 17, 1902, 32 Stat. 386" (Record p. 40).

As to the effect of such withdrawal the Supreme Court of the United States, in the case of McLaren v. Fleischer (253 U. S. 479), (hereinafter more fully reviewed) said:

"The withdrawal did not extinguish Rider's entry, but while in force, prevented the initiation of other claims."

From the foregoing authorities to the effect that a first form withdrawal under the reclamation act is legislative, and that no other claim to the land may be initiated during such withdrawal, we claim we are entirely justified and correct in asserting that the law allowing contests of public land entries together with its companion—the preference right law of 1880—is suspended during such withdrawal, and that therefore no valid or lawful contest of entries on such withdrawn lands may be had, and that no preference right as provided by the Act of 1880 may flow therefrom. It therefore follows that even if such a contest is entertained by the land department and the entry canceled, no legal right flows therefrom to the contestant.

In the case at bar the contestee,—the former entryman—filed his relinquishment of his entry and on such filing, the contest was withdrawn and the old entry canceled. [Record p. 41.] It thus is made to appear that regardless of the validity of the contest against his entry, he relinquished, and the land embraced in his entry reverted to the government and was, on April 18, 1910, open to public settlement.

Apparently in recognition of the legislative suspension of the contest law as affecting lands under a first form withdrawal, the land department sought to create by regulation a new right of contest by promulgating the regulations of June 6, 1905, section 6 of which provided:

“Any entry embracing lands included within any withdrawal made under either of the forms mentioned, whether such entry was made before or after the date of such withdrawal, may be contested and canceled because of entryman’s failure to comply with the law or for any other sufficient reason, and any contestant who secures the cancellation of such entry and pays the land office fees occasioned by the contest, will be awarded a preferred right of making entry under the Reclamation Act, provided the lands involved are not embraced within a withdrawal of the first form.” (33 L. D. 607.)

Here is apparent a direct attempt on the part of departmental officers to reenact the contest law as embodied in section 2297 of the Revised Statutes and

in section 2 of the Act of May 14, 1880, and which laws we claim were suspended by the first form withdrawal as to all lands embraced within such withdrawal.

By section 7 of the same regulations, the land department provided that "any contestant who gains a preference right to enter any such lands may exercise that right within thirty days from notice that the lands involved had been released from such withdrawal and made subject to entry." (33 L. D. 607.)

It was under the authority of these regulations that the contest of Florence V. Bodkin against the Geiger entry was entertained and the preference right awarded. Clearly the land department had no authority to legislate such a right, and therefore no preference right accrued to the contestant upon the relinquishment of the entry by Geiger and its cancellation by the commissioner.

On this point, this court has heretofore expressed itself in the case of *Edwards v. Bodkin* (249 Fed. 562), wherein these same regulations were before the court for consideration. It was therein said:

"If it should be conceded that defendant did obtain a preferential right to enter the land while the land was completely withdrawn from entry under the first form, it was a right which, based upon a regulation, might be terminated by the Secretary of the Interior before entry, and in our opinion was so terminated by the regulations of January 19, 1909."

The foregoing is in exact consonance with our claim that the Bodkin contest was not filed pursuant to statutory law, but pursuant to and under the authority of the regulations of 1905, and the statement of the court strongly tends to a declaration that no statutory preference right could be gained thereby.

On a second appeal taken in the same case and reported in 265 Fed. 621, this court said with reference to what it had decided on the first appeal, that it had decided, among other points:

“That the defendant acquired no preferential right by the proceedings had by reason of the lack of authority in the commissioner of the General Land Office to promulgate the rule under which the right is claimed.”

The rule referred to was section 6 of the regulations of June 6, 1905.

On appeal to the Supreme Court of the United States, taken by Bodkin in that case, the judgment of this Honorable Court was affirmed on motion and under a rule of that court, so that no decision on the law questions involved was made.

In another case, however,—*McLaren v. Fleischer*,—going from the Supreme Court of the state (181 Cal. 607), to the Supreme Court of the United States (253 U. S. 479) on certiorari, the latter court, in reviewing this court’s decision in the Edwards case, held that

“the observations of the Circuit Court of Appeals respecting preferred rights were *obiter dicta*, and

as the decree of affirmance in this court was put on other grounds, those observations are neither authoritative nor persuasive."

This statement however appears to be limited to that part of this court's decision touching the right of the land officers to extend the period of a preference right, where the land contested is under a withdrawal. No question of the legality of the contest itself was raised or decided in the McLaren case, either in the state court or the United States Supreme Court, the sole question for decision therein being declared by the Supreme Court to be "whether the officers of the land department erred in matter of law in holding that under the Act of May 14, 1880, Fleischer was entitled to thirty days after the land was restored to entry within which to exercise his preferred right of entry."

In that case the whole discussion was based on the assumption that the contest was a lawful contest, and that a preference right had accrued, and the decision therein to the effect that the rule embraced in section 7 of the regulations of June 6, 1905, was a reasonable construction of the Act of May 14, 1880, in connection with the Reclamation Act, was predicated upon the assumption of a legal contest, resulting in a legal preference right, the sole question therein being limited to the department's right to extend the life of such right.

It will thus appear that the question raised in our first point has not been passed upon by a higher court,

and that the decision and observations of this court relating thereto in the Edwards case, may well be herein repeated and declared to be the law. And we have the authority of the highest court as expressed in the same McLaren case for our assertion that during a first form withdrawal, no claim may be initiated to the land. The institution of a statutory contest is just as much the initiation of a claim to the land contested through the operation of the Act of May 14, 1880, as is the filing of an application to enter. If the contest is legal, and is successful, a preference right of entry follows, and under departmental construction since the beginning of such contests, such preferential right relates back to and takes effect as of the date of filing of the contest. It logically follows that by a contest one initiates a claim to the land contested. This, the highest court has said cannot be done. We respectfully submit that the Bodkin contest was not lawful, that no right flowed therefrom, that Geiger's relinquishment freed the land from other private claims, and that on the restoration under the order of January 10, 1910, the land in question was unoccupied public land of the United States and open to settlement. That by his actual settlement thereon on April 18, 1910, appellant gained the settler's preference right secured to him by section 3 of the Act of May 14, 1880, and that he exercised that right in a timely manner when he filed his homestead application on May 18, 1910, thus securing to himself the right to perfect his homestead entry by residence, improve-

ment and cultivation over a period of three years, thus earning the equitable title to the land and entitling him to a patent therefor. (Section 2291 Rev. Stat. as amended June 6, 1912.)

Second Point.

Granting for the sake of argument that appellees' deceased daughter gained a preference right to enter the land in question by virtue of her contest, and that she exercised it within the period allowed to her under the regulation of 1905, appellant claims that such application had the effect of exhausting whatever preference right she had had, and she thereupon became an applicant in the same standing as any other qualified homestead applicant. That having used her preference right in her homestead application, it was gone, and having died before such application had been allowed, her rights were terminated, in so far as her heirs are concerned, just the same as those of any other applicant would have terminated on death after application and before allowance. It has always been held by the land department that "no right is acquired by mere application to make homestead entry as will, in the event of the death of the applicant, descend to his widow or heirs or that can be disposed of by will; nor is there any authority of law for the allowance of entry, in such case, in the name of a deceased applicant." (Garvey v. Tuiska, 41 L. D. 510.) It was therefore held in this case by the land department that the allowance of the Florence V.

Bodkin entry after her death was erroneous, and it was ordered canceled. (Record p. 53.)

However, thereafter appellees claimed that the daughter's application was not a "mere application to enter" but by reason of having been filed by her under her preference right as successful contestant against Geiger's entry, is based on a statutory right of entry given by the Act of May 14, 1880, and preserved to her heirs by the Act of July 26, 1892 (27 Stat. 270).

This later act consists of an amendment of section 2 of the Act of May 14, 1880, by adding the following:

"Provided further, That should any such person who has initiated a contest die before the *final termination of the same*, said contest shall not abate by reason thereof, but his heirs who are citizens of the United States, may continue the prosecution under such rules and regulations as the Secretary of the Interior may prescribe, and said heirs shall be entitled to the same rights under this act that contestant would have been if his death had not occurred." (Italics ours.)

In the proceedings herein before the department and on motion for rehearing, the secretary, having decided that an application to enter was not inheritable, held that, notwithstanding the preference right had been used in the making of such application, it still existed for the purpose of descending to heirs, and decided that in the case at bar the heirs of Florence V. Bodkin inherited the right to consummate her

application, but being ineligible to perform the homestead requirements of residence and improvement because of the father holding another homestead in his own right, could not take the same, and ordered the cancellation of the daughter's entry. (Record pp. 54-60.)

Thereafter, on petition of appellees for the exercise of supervisory authority, in which for the first time, appellees claimed that appellant prevented settlement by their daughter on the land by threats and intimidation (although during all such time residence was not required, the entry being suspended pending a hearing as to the character of the land), the secretary, as we say, arbitrarily and without hearing or trial, other than by affidavit, decided to permit Bodkin to elect between the two homesteads,—his own and his daughter's,—and ordered that in the event that Bodkin should relinquish his own homestead, he, with his wife as co-heirs, should be allowed to file a new application for the land in question, in which event, appellant's entry should be canceled. (Record pp. 60-63.) Bodkin elected to relinquish and thereupon he and his wife filed the application to homestead herein upon which patent herein was subsequently granted; and thereupon the homestead entry of appellant was canceled. (Record p. 71.)

This was all done on the theory that appellant had no rights at all, except as the department had temporarily granted him, and that the preference right of the deceased daughter had survived its use in filing her

homestead, and had descended to her heirs so that they might exercise it long after it had already been once used, and years after the thirty day period after restoration had expired. And this in the face of the departmental decision of November 15, 1912, wherein it was held that "Miss Bodkin's application, in all respects regular, filed as aforesaid, in the exercise of her right as a successful contestant, was, in the circumstances stated, the equivalent of an actual entry." (Record pp. 50-52.) And in the face of the secretary's decision of August 29, 1913, wherein he held that "where contestant's death intervenes before the right of entry given him inchoately with his privilege of contest is merged into actual entry or otherwise extinguished in some of the ways indicated."

It must be quite patent that the accusation of intimidation and threats on the part of the appellant, made by appellees, so prejudiced the officers of the land department, that they were led into the mistake herein complained of, in their natural desire to punish a wrongdoer, and this without a trial or hearing of evidence. This attitude is further illustrated by the refusal of the department to hear or entertain an appeal of appellant duly taken from the order rejecting his application to contest the last Bodkin entry on the ground that he procured such entry and its allowance by fraud and perjury. (Record pp. 72-74-76-77 and 97.)

It will be observed that the Act of July 26, 1892, limits the application thereof to a contestant who dies

“before the final termination of the same.” We contend that final termination of a contest can be placed no later than the date of exercise of the preferred right, or the expiration of the thirty day period. The statute uses the expressions, “said contest shall not abate,” and that his heirs “may continue the prosecution thereof,” and “said heirs shall be entitled to the same rights under this act that contestant would have been if his death had not occurred,” all of which support the views expressed by us. The last act under a contest which may be permitted to a successful contestant is to exercise such right by filing an application. Thereafter, all virtues or special qualifications drop from the contestant, as a contestant, and he becomes an applicant, co-equal in rights and liabilities with all other applicants. The unallowed application of any other applicant to enter becomes defunct upon the death of the applicant. It is a fearful straining of terms and logic to argue that an applicant under a preference right secured by contest possesses power of casting the used up preference right by descent to his heirs. If such be true, then any settler who has settled on public land, and thereby gained the preferred right of entry under section 3 of the same Act of May 14, 1880, and who has duly filed his application to enter, pursuant to such preference right, but who dies before the application is allowed, could pass his preference right on to his heirs. Such is not the law, and in this respect a mistake of law was made by the land officials, and the decree herein is

erroneous in that it decides that such action of the land officials was correct and that in the circumstances the preference right of the deceased daughter descended to her heirs by virtue of the provisions of the Act of July 26, 1892.

Third Point.

We claim that whatever preference right was gained by Florence V. Bodkin through her contest of the Geiger entry, was gained by virtue of the regulations of June 6, 1905, and such right not having been exercised prior to the regulation of January 19, 1909, it was terminated by such latter regulations.

In the case of *Edwards v. Bodkin* (249 Fed. 562), this court so decided, and we feel that nothing in the McLaren decision is to the contrary.

Fourth Point.

The fourth point has been covered so completely in the discussion of the foregoing points, that no special argument appears necessary in its support, except to say that it appears from the evidence that for over two years the appellees elected to claim other land as a homestead, their claim to the land here in question during that time being, solely, that they had inherited the right to claim it *in addition* to such other homestead; that failing to secure an allowance of such claim, in order to establish a sort of settlement on the part of the daughter, they alleged that the daughter, during her lifetime, was prevented from settling

on the land applied for through fear of the appellant. No specific reason for such fear was stated, no intimidating act of appellant was set forth, no hearing was had on such charge, nor was any finding of intimidation ever made by the department, but instead, the department permitted the appellees to decide the matter for themselves by stating that if appellant had intimidated the deceased, he should not be permitted to profit by his wrong, if the heirs of deceased now desire to perfect her application by making entry thereon; and thereupon granted appellees the right to elect whether to relinquish the other homestead and to apply for that already allowed to appellant. (Record pp. 62-63.) We claim that in this action the officers of the land department transgressed judicial limitations and acted arbitrarily and contrary to justice, thereby depriving appellant of his homestead and the fruits of four years residence, improvements and labor.

Defenses.

Anticipating and meeting the defensive matter pleaded by appellees in their answer, appellant contends that he was not a trespasser on the land in question at any time. He camped on the county road until the land was opened to settlement on April 18, 1910, when he moved onto the land. (Record pp. 77-79.)

32 Cyc. p. 820. Note 74;

McAllister v. Ocanogan Co. (Wash.), 100 Pac.
146;

U. S. v. Bagnall T. Co., 178 Fed. 795;
Gourley v. Countryman (Okla.), 90 Pac. 427.

Appellees could not gain title by prescription where it appears that they and appellant were opposing claimants of title from the same government, until the requisite period of adverse user has elapsed after issuance of patent to one of them. The statute does not begin to run until the title passes from the government. (Patent herein was issued October 23, 1919, and this action was filed on February 13, 1920.)

Redfield v. Parks, 132 U. S. 239;
Gibson v. Choteau, 80 U. S. 92;
Godkin v. Cohn, 80 Fed. 458.

This is an action to recover title and possession of real property and the section of the California Statute of Limitations applicable to such action is section 318 of the Code of Civil Procedure, which reads as follows:

“No action for the recovery of real property or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action.”

Appellant's predecessor, the United States, was seized of this property up to October 23, 1919.

Curtner v. U. S. 149 U. S. 676;
Bradley Bros. v. Bradley, 20 Cal. App. 1;

Hillyer v. Hynes, 33 Cal. App. 506;
Truckee River G. E. Co. v. Anderson, 40 Cal.
App. 526-33.

Prior to issuance of patent, plaintiff was under total disability to commence this action.

Frost v. Spitley, 121 U. S. 552;
Merriam v. Bocchioni, 112 Cal. 191;
Sproat v. Durland (Okla.), 35 Pac. 682-6;
Redpath v. Denee (Wash.), 148 Pac. 15;
Van Drachenfels v. Doolittle, 72 Cal. 295;
Sec. 312 Code of Civil Procedure of California.

It is respectfully submitted that the decree of dismissal should be reversed.

HENRY M. WILLIS,
Attorney for Appellant.

No. 3939.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Charles E. Wells,

Appellant,

vs.

Patrick H. Bodkin and Arabella
Bodkin,

Appellees.

BRIEF FOR APPELLEES.

DAN V. NOLAND,

Attorney for Appellees.

No. 3939.
IN THE
United States
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Charles E. Wells,	
	<i>Appellant,</i>
<i>vs.</i>	
Patrick H. Bodkin and Arabella Bodkin,	
	<i>Defendants.</i>

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

We see no purpose to be served by a lengthy restatement in our brief of the allegations which are concisely set forth in the pleadings, nor do we see any necessity for such a statement of the proofs to be found in the record as is set forth in appellant's brief. Such statements of facts could only tend to raise an issue of fact and there could be no purpose in attempting to raise an issue of fact on this appeal unless done in the hope

of clouding and befogging the real issue, which is purely one of law.

The action was brought by the appellant against the appellees to procure a decree in equity declaring that the appellees held a title to a certain quarter section of land in trust for the appellant, requiring the appellees to convey title to the appellant, and for the value of the use of the land for the period set forth in the complaint. The prayer of the complaint is based on allegations to the effect that the appellant was wrongfully, through mistake of law, deprived of such title or the acquiring of such title and that the appellees were wrongfully and by mistake of law granted such title by the Land Department of the United States. There is no claim of fraud, either actual or constructive. As was said in *Quinby v. Conlan*, 104 U. S. 420 (26 L. Ed. 800):

“It would lead to endless litigation and be fruitful of evil if a supervisory power were vested in the courts over the actions of the numerous officers of the Land Department on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which upon a correct construction would have been conceded to them, or when misrepresentations and fraud have been practiced necessarily affecting their judgment, that the courts can in a proper proceeding interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled.”

To the same effect, the cases of

Gage v. Gunther, 136 Cal. 338;

McLaren v. Fleischer, 181 Cal. 607.

This last case was affirmed by the Supreme Court of the United States, reported in 256 U. S., at page 477.

However, we have no quarrel with counsel for appellant concerning his summary of the allegations of the complaint and the denials contained in the answer, though we cannot subscribe and concede that the proofs in the record show exactly what plaintiff would have the court believe are all of the facts.

But, as stated above, it is not necessary to go into the facts of this case as the only question for determination by the court on this appeal is one of law.

Reference to Assignment of Errors.

Appellant sets forth fourteen specific assignments of errors, found in the record, pages 114 to 116, inclusive. These are summarized and condensed in appellant's brief under five specifications of error, pages 16 and 17 of appellant's brief. We will refer to them as specified and numbered in appellant's opening brief.

Response to First Specification of Error.

Appellant's first contention is that the decree appealed from is erroneous in that it decides that the officers of the Land Department did not make a mistake of law in holding that a preference right of entry became vested in Florence V. Bodkin, who was the predecessor in interest of the appellees, as the result

of the successful termination of her contest of the Geiger entry following his relinquishment, while the land embraced in his entry was withdrawn from all forms of disposal under the Reclamation Act, and in holding that a preference right could be so lawfully acquired by reason of the successful contest of an entry of land so withdrawn.

It will be observed that the Geiger entry referred to was made on May 18, 1903, at which time the land embraced in the entry was not withdrawn under a first form withdrawal, said entry being made subject only to a second form withdrawal, which withdrawal had been made on July 17, 1902. The first form withdrawal was not made until after the Geiger entry had been allowed, to-wit, on September 12, 1903. It is conceded by all parties that the Geiger homestead application was allowed and he was granted an entry upon the land involved in this suit. It is also conceded by all parties that on January 30, 1908, Florence V. Bodkin filed a contest affidavit against the Geiger entry and that on March 13, 1908, contestant filed for record a relinquishment of the Geiger entry duly executed by the said Geiger and that the contestant paid the cancellation fee of \$1 and was notified that she was given a preference right of entry to be exercised within thirty days after the land was open for entry. [Record pp. 41-43.]

The situation is so similar to the case presented as set forth in the decision of the Supreme Court of the United States in *McLaren v. Fleischer*, 256 U. S. 477, at pages 478 and 479, that a substitution of the name

of Geiger in the place of Rider, and the name of Florence V. Bodkin in the place of Fleischer would make the situation practically identical.

As stated in that decision, concerning the right of the Rider entry, we can state in this case concerning the Geiger entry that while the withdrawal was in force one Bodkin instituted a contest against Geiger's entry and at her own cost procured its cancellation. Geiger acquiesced in that decision and is not concerned in the present controversy. Bodkin had no claim to the land prior to the contest and in instituting and carrying it through acted as a common informer, which was admissible under the public land laws. To encourage the elimination of unlawful entries by such contests, Congress had declared in the Act of May 14, 188, c. 89, 21 Stat. 40:

"In all cases where any person has contested, paid the land-office fees, and procured the cancellation of any pre-emption, homestead or timber culture entry, he shall be notified by the register of the land-office where such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to entry said lands."

When Geiger's entry was cancelled the register sent to Bodkin a written notice informing her thereof and stating that she would be allowed thirty days after the tract was restored to public entry within which to enter it in the exercise of her preferred right as a successful contestant. [Record p. 43.] The notice was dated July 1, 1908. Afterward the Secretary of the Interior issued an order whereby the lands included

in the withdrawal were restored to settlement under date of April 18, 1910, and to public entry on May 18th following. On the earlier date one Wells (the appellant herein) claims to have made homestead settlement on the tract here involved, and on the latter date, to-wit, May 18, 1910, said Florence V. Bodkin filed her homestead application and paid the fees therefor under her claim of preference right and on June 1, 1912, her entry was allowed; and on May 18, 1910, the same date that Bodkin filed her application, appellant filed his homestead application to enter the land in question by virtue of his alleged settlement; and on June 3, 1912, appellant was notified in writing that his application was rejected because of the homestead application of Florence V. Bodkin on the same lands filed May 18, 1910, under her preference right in the case of Bodkin v. Geiger. [Record p. 45 and p. 48.] Bodkin's application was allowed and Wells' rejected, the local officers being of the opinion that Bodkin had the prior and better right; that appellant duly appealed to the Commissioner of the General Land-office from such rejection and on November 15, 1912, the Commissioner affirms the rejection, holding that Florence V. Bodkin had acquired a preference right to enter said lands by virtue of the successful termination of her contest of the Geiger entry and that her application was in all respects regular and in the exercise of such preference right. [Record pp. 39-52.] Appellant appealed to the Secretary of the Interior, and on such appeal, it having become known to the Department that Florence V. Bodkin had died on March 25, 1912, the Secretary

cancelled the Bodkin entry and ordered the allowance of the Wells application in the event that he make proper showing of present qualifications to make homestead entry for the tract, making such decision on the proposition that the application of Florence V. Bodkin to make homestead entry did not descend to her heirs and that there was no authority of law for the allowance of entry in such case. [Record pp. 52-53.] Thereafter, appellees, as heirs of Florence V. Bodkin, made a motion for rehearing of the last mentioned decision of the Secretary, and on August 29, 1913, the Secretary denied such motion for the reason that it was made to appear that Bodkin, appellee, one of the heirs of the deceased Bodkin, had made other homestead entry in his own right, and in such decision directed that the entry of Florence V. Bodkin be cancelled and that the application of Wells should be allowed. Appellees thereafter petitioned the Secretary of the Interior for the exercise of his supervisory authority and on January 3, 1914, the Secretary decided that the filing of the application of Florence V. Bodkin under her preference right determined her heirs' rights in the premises so far as the form of entry under such preference right is concerned, and that no substitution for her homestead application of some other form of entry or purchase after the thirty days period could have been made by her or by her heirs so as to preserve such preference right and to extend the same beyond thirty days, but the appellees as heirs at law were held to have the right to perfect the deceased daughter's application by making entry

on the land, notwithstanding homestead entry that had been made by her father, one of said heirs; the Secretary holding that the fact of the father having made such homestead entry in his own right did not preclude his election to make and perfect homestead entry as co-heir with his wife, based on the application of his daughter, notwithstanding Wells' appearance in the case. In such decision, appellee Bodkin was allowed thirty days to elect whether he would relinquish his present homestead entry and make with his wife as co-heir homestead entry of the lands herein involved based on his daughter's application. [Record pp. 60-63.]

On January 26, 1914, appellee Bodkin was given notice in writing of the decision of the Secretary [Record pp. 64-65], and he thereafter on March 6, 1914, relinquished his homestead entry on other lands, and as one of the heirs, and for the heirs of Florence V. Bodkin, deceased, filed his application for homestead entry on the land in question, which was allowed on March 6, 1914, and attached thereto his affidavit stating that he made such application pursuant to the decision of the Land Department and as heir of said Florence V. Bodkin, and based on her application filed May 18, 1910 [Record pp. 67-70], and thereafter on May 2, 1914, the Commissioner of the Land-office cancelled the former homestead entry of Bodkin, appellee, on his relinquishment of March 6, 1914, and also cancelled the entry of appellant Wells.

In due course appellees received a patent for the land and appellant then brought this suit to have

appellees declared trustees for him of the title and to compel a conveyance in execution of the trust.

We submit that the foregoing statement is so nearly identical with the situation in *McLaren v. Fleischer* above stated that we need no further authority to support appellees' contention that the officers of the Land Department did not make a mistake in the law in holding that the preference right of entry became vested in Florence V. Bodkin as a result of the successful termination of her contest of the Geiger entry and in holding that a preference right could be so lawfully acquired as a result of a successful contest of an entry on lands so withdrawn. The language of the Supreme Court of the United States pertinent to this point is found in the decision of the *McLaren Case*, 256 U. S., at page 480, as follows:

"In the practical administration of the act, the officers of the Land Department have adopted and given effect to the latter view. They adopted it before the present controversy arose, or was thought of, and except for a departure, soon reconsidered and corrected, they have adhered to and followed it ever since. *Many outstanding titles are based upon it and much can be said in support of it.* If not the only reasonable construction of the act it is at least an admissible one. It therefore comes within the rule that the practical construction given to the Act of Congress is rarely susceptible of different construction by this authority, that the duty of exercising it is entitled to great respect and if acted upon for a number of years will not be disturbed except for cogent reasons."

The Supreme Court there cites the following decisions:

Brown v. U. S., 113 U. S. 258, 571;
Webster v. Luther, 163 U. S. 331, 342;
U. S. v. Hammers, 221 U. S. 220, 228;
Logan v. Davis, 233 U. S. 613, 627;
La Roque v. U. S., 239 U. S. 62, 64.

Response to Second Specification of Error.

Appellant's second specification of error is that the decree is erroneous in that it decides that the officers of the Land Department did not make a mistake of law in holding that the appellees herein, as heirs at law of Florence V. Bodkin, succeeded to and inherited the right of their deceased daughter to consummate her entry as evidenced and determined by her application of May 18, 1910, and in holding that such preference right was not terminated or exhausted by her application, but survived and descended to her heirs.

We submit that the decree is not erroneous in any of the respects mentioned in said specification.

The Supreme Court in the case of McLaren v. Fleischer having decided that under the provisions of the Act of Congress of May 14, 1880, the preference rights in question were valid, it necessarily follows that such right as was earned by Florence V. Bodkin by her contest against the Geiger entry descended to her father and mother under the Act of Congress of June 26, 1892. This act is an inheritance law and is intended to cast the preference right on the heirs undi-

minished and unimpaired by reason of any benefit ever taken by the heirs.

Biggs v. Fisher, 33 L. D. 465, was a case in which the homestead entry had been made by the defendant as heir of a successful contestant. This entry by the heir was contested on two charges, to-wit: (a) That the heir had theretofore, and in his own right, made and perfected a homestead entry; (b) that at the time of making entry as heir as was the owner of 160 acres. The said charges were admitted by the defendant. In dismissing the contest and sustaining the heir's entry the Department said:

"The Act of May 14, 1880 (21 Stat. 140), provided, in substance, that one who had successfully contested an entry should be entitled, for a period of thirty days after notice of the cancellation thereof, to a preference right to enter the land. In construing this act the Department held that all rights, present as well as prospective, that might have been acquired by a contestant by virtue of his contest, were purely personal, and that upon the death of a contestant pending final action on his contest, the proceeding, so far as he was concerned, abated, thus determining his rights thereunder. This ruling, while clearly correct, operated harshly upon the heirs of deceased contestants, many of whom had spent large amounts of money in the prosecution of their respective contests with a view to entering the land, and, when final decision was about to be rendered in their favor, died without having had an opportunity to reap the benefits of their endeavors.

Their estates were therefore despoiled of the money that they had so expended. It was this evil that was sought to be remedied by the Act of July 26, 1892, the purpose of said act being to provide a means whereby the citizen heirs of a deceased contestant might derive the same benefits from a contest commenced by their ancestor in his lifetime that such ancestor himself might have been entitled to had he lived. In the effectuation of this purpose *it was the intention of Congress, as clearly appears from the language used in the act and from the proceedings had in Congress with reference thereto, to place the heirs in the same position upon the successful termination of the contest that the contestant himself would have occupied if the contest had so terminated in his lifetime.* THE ONLY QUALIFICATION REQUIRED OF THE HEIRS BEING, AS EXPRESSLY STATED IN THE ACT, THAT THEY BE CITIZENS OF THE UNITED STATES. The Department therefore holds that upon the successful termination of a contest commenced by a person or persons who seek to exercise the preference right resulting therefrom show merely that they are the heirs of the deceased contestant and citizens of the United States, and that the contestant was a qualified entryman at the time of his death."

Biggs v. Fisher, quoted above, is sufficient authority for the proposition that the Act of July 26, 1892, was intended to cast the right upon the heirs undiminished and unimpaired by reason of any entry or filing theretofore made by the heirs or any of them.

Said act provided that the acts of heirs as such, or of persons in their representative capacity as heirs, shall be wholly unaffected by what their status toward the public land laws may be.

Response to Third Specification of Error.

In response to appellant's specification of error number 3, we submit that the decree is not erroneous in deciding that the officers of the Land Department did not make a mistake of law in holding that the appellees, as heirs at law of Florence V. Bodkin, were competent to inherit her preference right of entry, even after she had exercised her right by filing application based thereon, notwithstanding that at the time of her death and at the time of this contest the appellee Bodkin was holding a homestead in his own right.

Said Act of July 26, 1892, provided that the rights of heirs as such, or persons in their representative capacity as heirs, shall be wholly unaffected by what their status toward the public land laws may be in their personal or individual capacities.

“The purpose of the Act of July 26, 1892, was to provide a means whereby the heirs of a deceased contestant might derive the same benefits from a contest commenced by his ancestor in his lifetime that such ancestor himself might have been entitled to had he lived.”

Heirs of Robert M. Averett, 40 L. D. 608.

It appears from the statement of facts in the case of Hagman v. Klammer, 36 L. D. 168, that the successful contestant was alive at the time of cancellation of the

entry but died before notice of preference right reached him. We refer to Hagman v. Klammer for the reason that the decision therein was to the effect that if the successful contestant had been either a citizen or a person who had declared an intention to become a citizen, his heir would have acquired a preference right of entry by inheritance *despite the fact that the heir had absolutely nothing whatever to do with the prosecution of the contest and that it was after cancellation of the contested entry and, therefore, after the preference right had accrued and vested that the contestant died.*

While the point here involved is contained in appellant's specification of error number 3 on page 17 of his brief, the point is argued as "second point" on page 32, and we submit that counsel answers his own argument when he quotes the language of the section as follows:

"Said heirs shall be entitled to the same rights under this act that contestant would have been if his death had not occurred."

In other words, instead of the rights of Florence Bodkin lapsing when she exercised her preference right and filed upon the land involved, her interest in the land at that time attached, and it was that interest which was subsequently inherited by the heirs. The appellee Bodkin was not required to do anything until the rendition of the decision of the Secretary of the Interior requiring him to elect which parcel of land he would take.

Where a valid application has been made and the applicant dies before entry is allowed, even the right of entry descends to the applicant's heirs the same as if entry had been actually made.

Townsend v. Spellman, 2 L. D. 77;

Sturm v. R. R., 2 L. D. 546;

Sharrar v. Teachman, 5 L. D. 422.

And even where no application has been made owing to the fact that the land is unsurveyed, a settler may make a valid devise of his right of entry.

Tobias Beckner, 6 L. D. 136.

The law goes even further than this; in such cases the heir or devisee acquires the right of the decedent as one additional to those already possessed; thus entry may be made on the strength of an ancestor's application, though the heir has another entry which exhausts his right.

Dungan v. Griffin, 1 C. L. L. 254.

Response to Fourth Specification of Error.

In response to appellant's specification of error number 4, to the effect that the decree appealed from is erroneous in that it decides that the officers of the Land Department did not make a mistake of law in cancelling appellant's entry which had been allowed on October 14, 1913, and allowing the appellees' entry made on March 6, 1914, as heirs of Florence V. Bodkin, *without notice, hearing or evidence*, we must reply that the words, "without notice, hearing or evidence"

are not justified by the record. The cancellation of the entry erroneously allowed appellant was made after the exercise of supervisory authority by the Secretary of the Interior. Appellees filed two petitions with the Secretary of the Interior for exercise of that officer's supervisory authority, which petitions were filed September 29, 1913, and October 27, 1913, respectively, after a service of copies thereof on appellant by registered mail, and appellant made two answers thereto, one of such answers being filed October 27, 1913, and the other being filed December 8, 1913.

The matter of determining the rights of the parties was properly before the Department, and Bodkin's rights had not been abrogated, suspended or cancelled. Appellees had earned the right to a homestead, but of course had no right to two homesteads. The decision was rendered in the regular course of departmental business and there was no undue delay. The fact that nearly two years was consumed in arriving at the decision does not result in the loss by the Bodkins of the fruits of their *bona fide* efforts in complying with the homestead law. Inasmuch as they could not claim both homesteads, we do not see how the Department could in equity direct them to take either the one they had earned or the one they had inherited from Florence V. Bodkin, their daughter. This is neither a violation of the letter or the spirit of the law.

Supervisory power may be exercised on the Secretary's own motion and in the absence of appeal.

Knight v. Land Assn., 142 U. S. 178.

Such power is properly exercised to prevent substantial injustice.

Dickson v. Schlater, 2 L. D. 597.

The exercise of such power extends to a waiver of all irregularities in the proceedings, and consideration of the case on its merits.

C. W. Filkins, 5 L. D. 49.

To order a hearing out of time.

Alice Placer, 4 L. D. 314;

Sweeney v. Wilson, 10 L. D. 157;

Devereaux v. Hunter, 11 L. D. 214;

Tam v. Story, 16 L. D. 282.

Or to reopen a case that has been closed by failure to appear.

Pike's Peak Lode, 14 L. D. 47;

Purcell v. R. R., 14 L. D. 574.

And to dispense with the requirements of the rules of practice.

Yturbide v. U. S., 22 How. 290;

Poultney v. La Fayette, 12 Peters 472.

Response to Fifth Specification of Error.

Appellant's fifth specification of error as set forth in his brief is that the decree appealed from is erroneous in that it decides that the officers of the Land Department did not make a mistake of law in holding that the regulations of January 19, 1909, did not terminate any right that may theretofore have come to Florence

V. Bodkin by reason of the contest of the Geiger entry and its relinquishment and cancellation. In his argument he touches upon this specification under his "third point" on page 35 of his brief and cites as authority for such proposition the case of *Edwards v. Bodkin*, 249 Fed. 562. In the decision of the Supreme Court of the state of California in the case of *McLaren v. Fleischer*, 181 Cal., at page 615 (which decision was affirmed by the Supreme Court of the United States), we find this language:

"Appellant relies upon *Edwards v. Bodkin*, 249 Fed. 562, in support of his claim that the preference right was awarded to the respondent through a mistake of law. The decision there was not to the effect that the contestant was by mistake of law given the preference right. It was there held that the Commissioner of the General Land Office had mistaken the law in declaring that the settler had abandoned his homestead claim. In discussing the question the court remarked that the Reclamation Act did not confer authority upon the Secretary of the Interior to so extend the limitation of the Act of May 14, 1888."

And in the opinion of the Supreme Court of the United States affirming the decision from which the last quotation was taken, we find on page 482, Vol. 256 U. S. Rep., in speaking of the *Edwards* case, this language:

"Besides the defendant there was not claiming under an entry based on a preferred right, but under entries made after he had relinquished the entry which he claimed was based thereon; thus

the observations of the Circuit Court of Appeals respecting preferred rights were *obiter dicta*, and as the decree of affirmance in this court was put on other grounds, those observations are neither authoritative nor persuasive.

“Here it is not questioned that the original or first entry—that of Rider—was lawfully cancelled.”

(Neither is it questioned in the case at bar that the Geiger entry was lawfully cancelled.)

Continuing from the decision of the Supreme Court of the United States:

“McLaren recognized that that that entry had been lawfully eliminated when he sought to initiate the claim to the land.”

(Wells recognized that the Geiger entry had been lawfully eliminated when he sought to initiate the claim to the land here involved.)

Quoting again from the decision of the Supreme Court of the United States:

“He should also have recognized that Fleischer by his contest had brought about this elimination and was entitled as a reward to enter the land any time within thirty days after it was restored to entry.”

(Wells should also have recognized that Bodkin, by her contest, had brought about the elimination of the Geiger entry and was entitled as a reward to enter the land at any time within thirty days after it was restored to entry.)

Concerning the case of *Edwards v. Bodkin*, the same learned counsel in his brief upon the trial of this case in referring to the decision of the Supreme Court of the United States in *McLaren v. Fleischer*, had this to say:

“This disposes of the point raised in our former argument in this case that the preference right awarded to Florence Bodkin was null, and on that one question of law the decision of the Circuit Court of Appeals in the *Edwards v. Bodkin* case is overruled.”

We are unable to follow counsel when he states in one brief that a decision is overruled and cites in his brief on appeal the overruled case.

But we do not contend that the decision in the case of *Edwards v. Bodkin* as rendered by this court was overruled. In fact, the decision was affirmed by the Supreme Court of the United States, but in commenting upon the decision the court distinguished the *Edwards v. Bodkin* case from the case of *McLaren v. Fleischer* and pointed out that the case of *Edwards v. Bodkin* was decided on entirely different grounds. The *Edwards* case was obviously a different case from the one at bar, because of the radical difference of the status of plaintiffs in the respective cases with relation to the land involved. *Edwards* had a valid homestead entry and the United States Circuit Court held that the land-office officials erred in holding that he had abandoned his entry. *Edwards* in that case occupied the same relation to the land that *Geiger*, the original entryman in this case, occupied to the land here in-

volved. Wells, the appellant herein, never occupied such relation to the land in question.

We submit, therefore, that there is no point in any of appellant's contentions or arguments.

Response to Appellant's Anticipated Defenses.

Appellant goes to considerable length in anticipating defenses of appellees, and had these not been mentioned in the opening brief, we would be inclined to disregard same, but since counsel for appellant invites it, we will again say that appellant was at all times that he occupied the lands involved in this suit, a trespasser.

He attempted at the trial to remove his disqualification by testifying that he settled in the county road adjoining this land, but not upon it. At the time he settled in the spring of 1908 there was no county road in that vicinity, and if there had been he would have been upon the land in question according to his testimony on cross-examination wherein he stated he camped about 20 or 30 feet south of the center line of what would have been the road. This obviously locates him upon the land when he first settled early in 1908 as the center line of the road as later laid out is the north line of this land, and the road was 60 feet wide. [Record pp. 100, 101, 102, 103.]

Therefore, when he first settled he was a trespasser upon the private claim of Jacob Geiger, whose entry was still intact and uncanceled.

The Geiger entry was contested by Florence V. Bodkin on January 30, 1908, but was not cancelled until

July 1, 1908. On September 12, 1903, the Commissioner of the General Land-office issued a first form withdrawal order under the Reclamation Act of July 17, 1902, by virtue of which order the land involved became withdrawn land as soon as the Geiger entry was cancelled, and from that date appellant was a trespasser upon withdrawn public lands until entry was allowed the appellees, and thereafter appellant was a trespasser upon appellees' rightful possessions until dispossessed by the judgment of the Superior Court of the state of California, in and for the county of Riverside, in an action of ejectment. It thus appears conclusively that appellant was at all times a trespasser.

By virtue of being thus a trespasser, appellant was disqualified to make entry when the lands involved were finally restored to entry May 18, 1910.

32 Cyc. 816;

Smith v. Townsend, 148 U. S. 490;

Payne v. Robertson, 169 U. S. 323.

Appellant's citation from 32 Cyc. 820 and note 74, are not in point. The language of said note is as follows:

"Settlers who make valuable improvements on public lands *which have not been reserved for the exclusive use of the United States are not regarded as trespassers, etc.*"

Note the italicized qualification which applied in this case. These lands after the cancellation of the Geiger entry were reserved for the exclusive use of the United

States under first form withdrawal. Appellant's claim of **settlement** as of April 18, 1910, is a subterfuge to avoid the disqualification he was under because of his actual settlement and premature occupancy of the land for two years in disregard of the rights of other private persons or the United States. Hence his application, affidavit and payment of fees for a homestead entry could avail him nothing. This principle is clearly enunciated by the Supreme Court of the United States in *Payne v. Robinson*, 169 U. S. 323.

Appellant unlawfully entered upon and occupied the land involved over six years, to-wit, from March, 1908, to September, 1914. He was there over four years after he claims to have made entry. Why did he not at lease offer to make final proof? He admits he did not, yet claims three years occupancy while a trespasser earned him the title. We submit that the appellant falls far short in his proof of his right to control the legal title as against appellee.

Plummer v. Brown, 70 Cal. 544;

Payne v. Elliott, 54 Cal. 339;

Kentfield v. Hayes, 57 Cal. 409;

Chapman v. Quinn, 56 Cal. 266;

Burell v. Haw, 48 Cal. 225;

Powers v. Leith, 53 Cal. 711;

Hosmer v. Duggan, 56 Cal. 257;

Amrecochea v. Sinclair, 60 Cal. 532;

Atherton v. Fowler, 96 U. S. 513;

Hosmer v. Wallace, 97 U. S. 575.

With regard to the title acquired by adverse possession, we disagree with counsel for appellant that the United States is the predecessor of the appellant. In order that there may be a predecessor there must be a successor. Since the appellant is not the successor of the United States it follows that the United States is not the predecessor of the appellant. It is the appellees in this case who occupy the position of successor to the United States and the United States is the predecessor of the appellees and not of the appellant. The cases cited by appellant are relied upon by appellees in support of their contention that this case being in its final analysis one for the possession of real estate must have been commenced within five years after appellant was dispossessed. In *Curtner v. U. S.*, 149 U. S. 676, which was one by the United States to correct a patent, the court held that the United States was barred by the statute of limitation because it had no interest in the land in question, and the parties in interest in litigating between themselves would have been barred by such statute. The language of the court in this respect was as follows:

“Under the laws of California an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim, but no action can be brought for the recovery of real property or possession thereof, or arising out of the title thereof, unless such action is commenced within five years after the cause of action shall have accrued, but an action for relief

not otherwise provided for must be commenced within four years. The California Code of Civil Procedure, sections 318, 319, 343 and 738. Whether the statute be applied directly, or by analogy, or the rule in equity founded upon lapse of time and staleness of claim the delay and laches here are fatal to the maintenance of suit."

The point decided in *Bradley Brothers v. Bradley*, 20 Cal. App. 1, was that an action such as this is an action to recover possession of real property and is governed by section 318 of the Code of Civil Procedure instead of section 343.

In *Hillyer v. Hynes*, 33 Cal. App. 506-510, the court says:

"We think, however, that while the main ground of the action is constructive fraud and that one of its purposes is to enforce a trust, in its final proposition it is an action to recover the title and possession of real property and is therefore subject to the provisions of section 318 of the Code of Civil Procedure. Accordingly the five-year period prescribed by that section is the only limitation which can be applied in bar of plaintiff's cause of action." (Citing other California cases.)

To us this language means that from the time appellant was dispossessed, if he had any right at all, he had the right of action to recover possession until that right was lost by lapse of time.

Again, in the case cited by appellant, *Truckee River G. E. Co. v. Anderson*, 40 Cal. App. 526, at page 532:

“Actual possession in hostility to the true owner works a deseizin and if a deseizor is suffered to remain continuously in possession after the statutory period the remedy of the former is extinguished.”

Appellant's last proposition that he was under total disability to commence this action until the issuance of patent is correct if the action be treated solely as a suit to enforce a trust. He could not maintain an action to control the legal title so long as the title remained in the United States, but treating the action as he does, as an action to recover possession and damages, the authorities cited are against him, particularly *Sproat v. Durland*, 35 Pac. 682, which was a suit for injunction to prevent interference with the possession of a homestead claim. That is an Oklahoma case where they did not have our statute relative to unlawful detainer, and the courts held that action for ejectment would not lie, but in that case the rights of the parties to possession was determined prior to the issuance of patents in an injunction proceeding, just as the rights of the parties to possession in this case were determined by the Superior Court of Riverside county by the action in which appellant was dispossessed, as alleged in his complaint, by a judgment duly made and given in that court.

In every instance in which the courts have said that “the statute of limitations does not begin to run until after the patent has been issued,” so far as we have been able to find, it has been a case where the person

in possession was asserting an adverse possession against the patentee. It is stated that legal title remains in the United States until patent issues, and that the statute will not run against the government, hence will not run against the patentee, but as against all the world except the government the statute does run.

Page v. Fowler, 28 Cal. 605;

Hayes v. Martin, 45 Cal. 559.

The language of the court in this last case is in part as follows:

“It is not requisite that the party who relies upon the statute should show that he claims title in hostility to the United States; he may admit title in the United States either with or without a claim on his part of the right to acquire the title from the United States, and it is sufficient if he has such possession as is required by the statute and claims in hostility to the title which the plaintiff establishes in the action.”

A party may invoke the statute of limitations in reference to rights over government lands.

Page v. Fowler, 28 Cal. 605;

McManus v. O'Sullivan, 48 Cal. 15;

Page v. Fowler, 37 Cal. 103;

Farish v. Coon, 40 Cal. 57;

Hayes v. Martin, 45 Cal. 559;

Lord v. Sawyer, 57 Cal. 65.

Since the statute of California has run against the appellant in this case, and the appellees hold the patent

as well, we submit that the cases cited by counsel in anticipation of this defense are inapplicable and that the cases here cited and hereinafter cited are more in point and controlling.

If appellant ever had any rights in the land, which we contend he did not, such right to recover possession by this or any other action is barred by sections 318, 319, 323 and 325 of the Code of Civil Procedure of the state of California.

To constitute adverse possession and set the statute of limitations to running, terminating in a bar, there must be present and proved five distinct elements. In this case these are admitted to have been alleged and proved. They are:

1. The possession must be actual, exclusive, open, notorious and not clandestine.
 2. It must be hostile to the plaintiff's title.
 3. It must be under a claim of title exclusive of any other right than one's own.
 4. It must be continuous and uninterrupted for five years prior to the commencement of the action.
 5. All taxes must have been paid by the occupant.
- Unger v. Mooney, 63 Cal. 586.

When title by adverse possession has been thus acquired, it not only bars the remedy but it distinguishes the right of the holder to title.

Arrington v. Lescomb, 34 Cal. 365;
Cannon v. Stockmon, 36 Cal. 535;
San Francisco v. Fulde, 37 Cal. 349.

It is sufficient not only to bar a claim under a legal title, but also to create a title known as title by prescription.

- Owsley v. Matson, 156 Cal. 401;
- Wheatley v. San Pedro L. A. & S. L. R. R., 169 Cal. 505;
- Cummings v. Laughlin, 163 Cal. 561;
- LeRoy v. Rogers, 30 Cal. 229;
- Arrington v. Lescomb, *supra*;
- Cannon v. Stockmon, *supra*.

Conclusion.

We submit that before appellant can be permitted by a court of equity to control the legal title conveyed by patent from the United States Government to the appellees, he must establish a far different status in relation to the land involved than has been established in this cause. We maintain that he was a trespasser at all times that he was upon the land in question; that therefore his settlement was illegal and his subsequent residence availed him nothing; that the appellees inherited the valuable preference right acquired by their daughter, Florence V. Bodkin, by virtue of her contest against the Geiger entry, which was cancelled as a result of her contest; that the Secretary of the Interior did not mistake the law in recognizing this vested interest in the appellees and in issuing patent to them upon their homestead entry made at the direction of and in accordance with the requirements of the Secretary of the Interior.

We submit in conclusion that since the Supreme Court of the United States has held in affirming the Supreme Court of the state of California in the case of McLaren v. Fleischer that preference rights granted to contestants such as Florence V. Bodkin, predecessor of the appellees, were legally allowed, and since those rights were legally extended for a period of thirty days beyond the restoration to entry of the land involved as decided by the Supreme Court of the United States, and since there can be no question under the authorities herein cited that such right is inheritable, we can find no error in the decree appealed from and submit that the same should be affirmed.

DAN V. NOLAND,

Attorney for Appellees.

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